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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a municipality, pursuant to a general grant of authority from a state to operate an airport, may refuse to permit an air carrier to use the airport and those facilities required for its operation as an air carrier?

2. Whether an air carrier may privately enforce violations of the federal aviation laws where such violations amount to improper discriminatory treatment?

3. Whether local government antitrust immunity from injunction can be predicated on a state statute which while expressive of competitive displacement is nonetheless violative of federal laws?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines,[1] and the respondents Judith Hope, Randall Parsons, Anthony Bullock, Michael J. Finazzo, and Hugh King, Individually and as the Town Board of the Town of East Hampton, New York, Charles T. Smith, Russell Stein, East Hampton Aire, Inc., and Frank LaVigna.

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[1]Petitioner Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines, is privately owned by A. R. Landsman who holds 50% of the stock and Budd Levinson who holds 50% of the stock and has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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IN THE

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OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as The Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LAVIGNA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 14, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 784 F.2d 91, and is reprinted in Appendix D hereto.

The memorandum decisions of the United States District Court for the Eastern District of New York (Bramwell, D.J.) have not been reported. They are reprinted in Appendices B and C hereto.

JURISDICTION

Invoking federal jurisdiction and alleging violations of 15 U.S.C. §§ 1, 2, 15 and 26, the Federal Aviation Act, 49 U.S.C. §§ 1305, 1349(a), 2210(a), the Civil Rights law, 42 U.S.C. § 1983, the petitioner brought this suit in the Eastern District of New York. On May 28, 1985, the Eastern District granted motions of the Town defendants to dismiss the complaint for failure to state a claim, but left open the petitioner's Sherman Act claims. On September 4, 1985, the Eastern District granted the Town defendants' motion to reargue and dismissed the complaint.

On petitioner's appeal, the Second Circuit on February 14, 1986, entered a judgment affirming the Eastern District's orders. A petition for rehearing was sought and denied by order of March 27, 1986.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are 49 U.S.C. 1305, 49 U.S.C. § 2210 and 42 U.S.C. § 1983, copies of which are reproduced at Appendix I.

STATEMENT OF THE CASE

This case concerns the attempt of a municipality to restrict and control scheduled commercial airline services in violation of the Constitution and federal statutes.

Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines ("MCA") is a New York corporation engaged in the business of a commercial air carrier. Since the early 1960s, it has so operated out of the East Hampton, New York Airport. Up until 1978 it also operated as the sole fixed base operator ("FBO") from that airport.

An FBO is an entity which provides services for aircraft, including fuel, maintenance, tie downs, parking and so forth. *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543 (M.D.N.C. 1979). An air carrier by contrast, provides passenger transportation, ticketing for such passengers, and requires the services of an FBO to accomplish these activities. While totally distinct, an air carrier cannot operate without an FBO.

In 1978 defendant East Hampton Aire, Inc. ("EHA") also began acting as an air carrier and FBO at the East Hampton Airport. In 1979 MCA entered into a new lease with the Town which relieved MCA of its prior obligation of providing FBO services on a daily basis for twelve months of the year. The lease provided instead that MCA would be required to furnish FBO services "every day of each year except for the period from October 1 to April 30 of each year."

Even though MCA was relieved of *having* to provide FBO services for seven months of the year, MCA

contends that it is still *entitled* to operate as an air carrier and FBO from the airport on a year-round basis as it had done for the previous years. Put differently, the new lease did no more than specify a guaranteed minimum period for FBO services by MCA; it did not exclude FBO services—much less air carrier services—for the entire year. Even so, the Town Board has prohibited MCA from operating on a year-round basis. Only EHA is permitted by the Town to use the facilities necessary for support services year round.

The dispute between MCA and the Town has intensified since 1982 with the result that MCA was advised in October of 1984 that it was in violation of the terms of its lease and ordered to cease all operations. Thereafter, MCA filed a complaint with the Federal Aviation Administration ("FAA") alleging that the Town of East Hampton had discriminated against it. In 1985, after an informal investigation, the FAA found in favor of MCA, but the Town has taken no action.

In November 1985 the Town changed its position and conceded MCA's right to fly in and out of the East Hampton airport. (Until then MCA was prohibited by the Town from flying into East Hampton for more than five months a year.) Notwithstanding, the Town continued to refuse to permit MCA to support its business by the use of facilities for on-ground services such as ticketing, aircraft tie-downs, fueling and so forth.[2] The overall result of denying MCA these

[2] The Town's refusal was temporarily enjoined by the Second Circuit. The injunction was dissolved on February 14, 1986 and the Town is again trying to prohibit MCA's use of the airport facilities necessary for passenger services.

facilities would be the destruction of MCA as an air carrier at East Hampton. MCA cannot solicit and encourage business without direct contact with its passengers at the East Hampton airport. If MCA's passengers have to purchase tickets, deliver and receive their baggage, and accept other services from EHA—MCA's sole competitor at East Hampton—and MCA must depend on EHA for its aircraft fuel, then MCA will be totally and completely precluded from operating as an air carrier at East Hampton.

As a direct result of the earlier prohibition against year-round flying into East Hampton, MCA's share of the passenger travel shrunk from forty-four percent in 1980 to eleven percent in 1984. The Town's refusal to permit MCA to use the necessary facilities to service its passengers at East Hampton will further severely and irreparably harm MCA. All of this activity inures to the sole benefit of EHA, the only other carrier servicing the Town of East Hampton. The ultimate result is that the air carriers which compete for passenger business into and out of East Hampton, New York are determined not by market forces—as required by deregulation—but by the Town Board of East Hampton.

REASONS FOR GRANTING THE WRIT

I. The Federal Aviation Laws Prevent A Municipality, Acting Pursuant To A General Grant Of State Authority, From Refusing A Carrier Landing Rights And The Furnishing Of Services Incidental To Those Rights

The Second Circuit sustained the Eastern District's dismissal of the Complaint[3] on the grounds that while

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[3] Pursuant to FED. R. CIV. P. 12(b)6.

the Federal Aviation Laws may provide protection to MCA, MCA privately could not assert those rights. This holding was erroneous for several reasons. Moreover, if the decision is permitted to stand, it effectively will create a Civil Aeronautics Board at every municipal airport in the country from which there is no administrative or judicial review. Clearly that was not the intent of Congress.

Section 511(a) of the Airport and Airway Improvement Act of 1982 ("AIP") provides that:

> [I]n a project grant application submitted under this Title, the Secretary should receive assurances, in writing, satisfactory to the Secretary, that—
>
> (1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport . . . shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges in such nondiscriminatory and substantially comparable rules, regulations, and conditions, as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities. . . .
>
> (2) there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. . . .

49 U.S.C. § 2210(a).

The predecessor to § 2210(a), 49 U.S.C. § 1718 (originally enacted in 1970), was amended in 1976 to

specifically include air carriers and fixed-base operators. The statute identifies air carriers as among the class Congress intended to benefit by passage of the Act. *New York Airlines, Inc. v. Dukes County,* 623 F. Supp. 1435, 1446 (D.C. Mass. 1985); cf. *Stepanischen v. Merchants Despatch Transportation Corp.,* 722 F.2d 922 (1st Cir. 1983). *But see Hill Aircraft Leasing v. Fulton County,* 561 F.Supp. 667 (N.D. Ga. 1982), *aff'd without opinion,* 729 F.2d 1967 (11th Cir. 1984); *Guthrie v. Genessee County, New York,* 494 F.Supp. 950 (W.D.N.Y. 1980).

The legislative history of 49 U.S.C. § 1718 provides that Congress intended to recognize "the legitimate interest of air carriers and fixed-based operators in development at airports." H.R. Rep. No. 94-594, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 1600, 1614; *New York Airlines,* 623 F. Supp. at 1446.

The amendments to § 1718 were intended to require airport sponsors to "accord . . . rights of consultation" to air carriers in making decisions to undertake airport development. Further, the section as amended prohibited sponsors [here the Town] from charging discriminatory rates, fees, rentals and other charges which "make the same or similar uses of such airport utilizing the same or similar facilities." *Id. See discussion in New York Airlines,* 623 F. Supp. at 1447.

As Judge Wolf concluded in *New York Airlines:*

> Although the specific concern of Congress was with discrimination against supplemental carriers, the language adopted in the amendment [to § 1718] comprehensively includes all air carriers using the airport. The legislative

> history therefore indicates that Congress in enacting the statute intended to benefit air carriers by imposing the requirement on airport operators that carriers be subject to nondiscriminatory and substantially comparable treatment.

623 F. Supp. at 1447.

Importantly, 49 U.S.C. § 2210(a) uses mandatory language in its proscriptions. Airport operators are *required* to insure that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination. . . ." 49 U.S.C. § 2210(a)(1). Further, the statute specifically provides that "there will be no exclusive right" for the use of an airport. 49 U.S.C. § 2210(a)(2).

This language describes far more than a Congressional preference; rather, it expresses a Congressional intent to bar exclusive rights to the use of airport facilities absent extraordinary circumstances. *New York Airlines,* 623 F. Supp. at 1447. *Accord: City of Dallas v. Southwest Airlines Co.,* 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd,* 494 F.2d 773 (5th Cir. 1974), *cert. denied,* 419 U.S. 1079 (1974), *reh'g denied,* 420 U.S. 913 (1975); *City of Pompano Beach v. FAA,* 774 F.2d 1529 (11th Cir. 1985); *Niswonger v. American Aviation, Inc.,* 411 F. Supp. 769 (E.D. Tenn.), *aff'd* 529 F.2d 526 (6th Cir. 1975). Yet here, as a result of the two decisions of the lower courts, MCA has been denied even an *opportunity* to require the Town to show such extraordinary circumstances.[4]

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[4] MCA's case was dismissed on a Rule 12(b)6 motion for failure to state a claim. Such motions should not be granted unless it

Here, exclusive rights to the airport—by denying MCA use of the facilities necessary for its support services— have in effect been granted EHA to the detriment of MCA. It is clear that 49 U.S.C. § 2210 bars the activities engaged in by the Town. Despite the plain intent of Congress—and the clear supremacy of the federal law over state, much less municipal, regulations—MCA remains excluded from East Hampton Airport without even having had its day in court.

II. Protection Against Non-Discrimination Provided By The Federal Aviation Laws May Be Privately Enforced By An Air Carrier

A. MCA May Sustain a Claim Pursuant to 42 U.S.C. § 1983.

The District Court and the Second Circuit both held that MCA could not sustain its cause of action for violations of § 2210 pursuant to 42 U.S.C. § 1983. Those rulings were in error.

In *Maine v. Thiboutot,* 448 U.S. 1 (1980), this Court held that §1983 "broadly encompasses violations of federal statutory as well as constitutional law." 448 U.S. at 4. Following *Thiboutot,* this Court defined only two types of circumstances in which a § 1983 remedy is not available:

> (i) whether Congress [intended to prohibit] private enforcement of [a] statute in the enactment itself, and

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appears to be a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim. *Conley v. Gibson,* 355 U.S. 41 (1957); *Cook & Nichol, Inc. v. Plimsoll Club,* 451 F.2d 505 (5th Cir. 1971).

> (ii) whether the statute at issue [is] the kind that create[s] enforceable "rights" under § 1983.

Middlesex County Sewage Auth. v. National Seaclammers Ass'n., 453 U.S. 1, 19 (1981); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981), *rev'd on other grounds*, 465 U.S. 89 (1984). The Second Circuit relied upon these decisions in finding that "the comprehensive enforcement scheme provided in the Federal Aviation Act manifests Congressional intent to foreclose an action under § 1983." *See* Appendix D. That decision is simply incorrect and contrary to the Second Circuit's own decision in *Beckham v. New York City Housing Authority*, 755 F.2d 1074 (2d Cir. 1985).

The analysis to be applied in making a determination as to whether a § 1983 action is available is similar to the analysis relating to implied rights of action because in both a party must demonstrate the existence of a federal right which may be judicially enforced. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982); *New York Airlines, Inc.*, 623 F. Supp. at 1444. The ultimate test is one of determining legislative intent. *See Curran*, 456 U.S. at 377-78; *Touche & Ross Co. v. Reddington*, 442 U.S. 560, 575-76 (1979); *New York Airlines*, 623 F. Supp. at 1445.

MCA does not dispute that § 1983 is a remedial statute that does not itself give rise to any substantive rights. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). A plaintiff must show that the statute violated is one that confers a federal right. Whether this Court applies a test requiring that a plaintiff demonstrate it is "an intended beneficiary"

of the program, *Balf Co., Inc. v. Gaitor,* 534 F. Supp. 600, 605 (D. Conn. 1982), *aff'd,* 709 F.2d 1235 (9th Cir. 1983), *vacated on other grounds,* 465 U.S. 1095 (1984), or that the plaintiff must show a benefit similar to that required to establish a private right of action, *Boatowners and Tenants Ass'n. v. Port of Seattle,* 716 F.2d 669, 673 (9th Cir. 1983), the facts presented in the Complaint demonstrated that MCA asserted such a right and that it should be permitted to put on its proof.

As stated, § 2210(a) clearly intended to confer rights upon air carriers and fixed-based operators. *See discussion, supra,* at pp. 5-9. Also, as noted, the statute makes use of mandatory language requiring airport operators to insure that the airport "will be available for public use on fair and reasonable terms without unjust discrimination" as well as providing that "there will be no exclusive right" for the use of airport facilities. 49 U.S.C. §§ 2210(a)(1) and 2210(a)(2).

The Second Circuit ruled that the "comprehensive enforcement scheme" of the Federal Aviation Act manifested Congressional intention to foreclose an action under § 1983. Section 2210, however, does not arise under the Federal Aviation Act; rather, it was a provision of the Airport and Airway Improvement Act of 1982. The latter act contains *no* independent enforcement mechanism. Further, 49 U.S.C. § 1506 [§ 1106 of the Federal Aviation Act] specifically provides that the statutory remedies provided therein are not intended to be exclusive.

Based upon this reasoning, MCA has stated facts at the very least sufficient to overcome a motion to dismiss. MCA has alleged that it was denied the right to make use of the Town airport year-round because

of the Town's decision to protect an already existing carrier. That was deemed sufficient to state a cause of action in *New York Airlines,* 623 F. Supp. at 1448. It is sufficient here as well. This is particularly true in view of the fact that the Federal Aviation Administration explicitly found that the town was discriminating against MCA in refusing to permit it to operate year-round. *See* Letter of Thomas C. Halloran, Regional Counsel, dated January 7, 1985, Appendix H. *See also City of Pompano Beach v. F.A.A.,* 774 F.2d 1529 (11th Cir. 1985).

B. 49 U.S.C. § 2210 Provides a Private Right of Action.

In addition to being permitted to assert its claims arising out of the protections accorded by 49 U.S.C. § 2210 under the auspices of 28 U.S.C. § 1983, § 2210 itself creates an implied right of action that permits MCA privately to assert its rights in the federal courts.

In *Cort v. Ash,* 422 U.S. 66 (1975), this Court stated that four factors must exist before a private right of action may be implied under a federal statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the

> States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted).

As we have seen in the analysis of MCA's rights under § 1983 *supra*, § 2210(a) meets all four of these enunciated factors.

First, it is evident from the legislative history of the Airport and Airway Improvement Act that air carriers and fixed-base operators are the class "for whose *especial* benefit the statute was enacted". As noted, the legislative history of the 1976 revisions to the predecessor to § 2210 made it clear that the amendments were intended to recognize "the legitimate interests of air carriers and fixed-based operators in development at airports." Further, airport operators are prohibited from charging "discriminatory rates, fees, rentals, and other charges to airport businesses which make the same or similar uses of such airport utilizing the same or similar facilities." H.R. Rep. No. 94-594, 94th Cong. 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 1600, 1614. *See discussion in New York Airlines,* 623 F. Supp. at 1447.

The text of the statute itself also makes clear that air carriers and fixed-based operators are within the class that the statute was intended to protect. Section 2210(a)(2) states that "there will be no exclusive right" for the use of airport facilities. Section 2210(a)(1) provides that each air carrier "shall be subject to . . . nondiscriminatory and substantially comparable" terms and conditions. There is no indication, as there is in other aviation acts, that these provisions

were enacted solely for the benefit of the general public. *Compare* 49 U.S.C. §§ 1305 and 1349; *New York Airlines,* 623 F. Supp. at 1448-1450. To the contrary, § 2210 specifically addresses issues that are of concern only to air carriers such as the prohibition of discriminatory treatment and a prohibition of the exclusive use of air facilities. Thus, § 2210 meets the first of the *Cort* criteria.

Second, the Court must inquire as to whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" *Cort,* 422 U.S. at 78. As noted, the Airport and Airway Improvement Act has no independent enforcement mechanism. In other words, the Federal Aviation Administration is not empowered pursuant to that act to enforce the provisions of the statute. It is anomalous to suggest that the Congress would enact a legislative scheme specifically aimed at preventing discrimination against air carriers and prohibiting the exclusive use of air facilities if there was to be no enforcement mechanism. There is no expression of Congressional intent to deny such a remedy. Under the circumstances, it seems clear that there was a Congressional intention that an air carrier be permitted to enforce its rights privately since the Federal Aviation Administration is not granted the right to do so in its behalf.

The third *Cort* factor to be considered is whether an implied right of action is consistent with the underlying purpose of the legislative scheme. This factor is closely related to the second. Here the predominant purpose of the legislative scheme is to prevent exclusive use of air facilities in order to insure that the critical component of a deregulated system—compe-

tition—can flourish. Absent any other enforcement mechanism, there must be a method by which private parties can seek relief from discriminatory treatment. Any other result would be inconsistent with the statutory scheme.

Finally, the Court is to determine whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law. Of all the factors, this is the most easily decided in MCA's favor. The use of air facilities has long been regulated by the United States. The Federal Aviation Act was first adopted in 1958. Prior to the passage of the Airline Deregulation Act of 1978, all aspects of travel by air were regulated by the federal government. The intense federal interest in this area continues today, and did in 1982 when the Airport and Airway Improvement Act (of which 49 U.S.C. § 2210 is a part) was enacted.[5] This is traditionally an area of federal regulation and it is appropriate for an air carrier's rights to be protected by federal legislation—and by the federal courts.

III. The Town's Activities Are Not Protected From Injunction Under The State Action Doctrine

In Count I MCA sought, among other things, injunctive relief under 15 U.S.C. § 26 to prohibit the Town from conspiring with the other air carrier, East

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[5] In 1984, Congress removed any question of the prohibition contained in 49 USC ¶ 1305(a) by an amendment deleting from subparagraph 21 thereof the word "interstate" preceding the final two words "air transportation." The effect of the amendment was to extend the prohibition against state action to all air carriers whether authorized for interstate or intrastate air transportation.

Hampton Aire, Inc. (EHA), to both restrain trade and create a monopoly at the East Hampton Airport, activities which are prohibited by 15 U.S.C. §§ 1 and 2. It was specifically alleged that the Town board and EHA conspired to prevent MCA from obtaining year-round use of the air facilities. These actions were directly related in an illegal restraint of trade and have created a monopoly for the benefit of EHA.

The Second Circuit reasoned that a suit for injunctive relief could not be maintained because of the "state action doctrine," most recently enunciated by this Court in *Town of Hallie v. City of Eau Claire*, ___ U.S. ___, 105 S. Ct. 1713 (1985). *See also Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978); *Parker v. Brown*, 317 U.S. 341 (1943).

The *Hallie* doctrine exempts municipalities from antitrust violations if they establish "that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' " *Hallie*, 105 S. Ct. at 1716 (quoting *City of Lafayette*, 435 U.S. at 413). As the Second Circuit noted, a municipality is entitled to protection by the exemption where it "demonstrate[s] that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Hallie*, 105 S. Ct. at 1717.

The Second Circuit relied upon N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 & Supp. 1984-85), as providing the necessary clear articulation of State policy to displace competition with monopoly public service as required by *Hallie*.

That statute, provides in part, that a Town Board operating a local airport may:

> 5. Lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or nonexclusive basis, for the entire operation for such airport or landing field, or of any part thereof, or for the rendering of various services or conduct of business activities, on or at said airport or landing field. . . .

The defect in this reasoning is, however, that the New York Law is itself illegal because it runs afoul of the Supremacy Clause of the Constitution of the United States, U.S. CONST., art. VI, cl. 2, which invalidates state laws that "interfere with or are contrary to" federal law. *See Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824).[6] With regard to the Federal Aviation laws, it has been constantly reemphasized that the Federal legislation is supreme and preemptive when it conflicts with municipal authorities attempting to exercise proprietary and non-proprietary restrictions over aircraft. This has been true in airport noise cases, *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973); *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982); *British Airways Board v. Port Authority of New York,* 564 F.2d 1002 (2d Cir. 1977); *United States v. County of Westchester,* 571 F. Supp. 786 (S.D.N.Y. 1983); *United*

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[6] Moreover, the New York law was originally adopted in 1945 (as a replacement for a 1928 statute) long before the passage of the applicable Federal Aviation laws.

States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), in exclusive FBO lease cases, *City of Pompano Beach v. F.A.A.*, 774 F.2d 1529 (11th Cir. 1985), and in exclusive access cases, *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015 (N.D. Tx. 1973) *aff'd*, 494 F.2d 773 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974), *rehearing denied*, 420 U.S. 913 (1975), most recently in the access case involving New York Airlines. *New York Airlines, Inc. v. Duke County*, 623 F. Supp. 1435 (D.C. Mass. 1985). Only the decision of the Second Circuit in this case suggests that federal law must take a back seat to state and local regulations.

The New York Law dir ctly conflicts with the prohibitions of the exclusive use of an air facility by an air carrier contained in the Federal Aviation Act, 49 U.S.C. §1305(a). That act provides:

> Preemption. (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this Act to provide air transportation.

49 U.S.C. § 1305(a).

Section 352 of the New York Municipal Laws quoted above directly violates the prohibitions of §1305(a) which by its very title "preempts" this field of the law and prohibits states from regulating rates,

routes or services of an air carrier. It cannot, and has not, been argued that the actions of the Town here were anything other than an attempt to regulate MCA's rates, routes and services. Thus, the invalid New York law can provide no immunity to the Town to protect it from injunctive relief.[7]

The Second Circuit posited that § 1305(a) does not preempt the activity at issue here because § 1305(b)(1) provides that subsection (a) is not to be construed to limit the authority of "any . . . political subdivision as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights." 49 U.S.C. § 1305(b). It apparently was the view of the Second Circuit that this subsection overrides § 1305(a) and that because the Town was exercising its proprietary rights in leasing property there was no conflict between the federal and state statutes.

The effect of the ruling of the Second Circuit is to totally reverse the intention of the Airline Deregulation Act. The primary purpose of that Act was to allow the marketplace to make judgments as to which and how many carriers should operate in any given air facility. Section 1305(a) was intended to preempt local regulations of routes, rates and services. The Town's actions more than regulate MCA's routes, rates and services—they effectively prevent MCA from existing at East Hampton.

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[7] Even during this litigation, the Town has required that MCA furnish its proposed rates, routes, and services as a precondition to the Town's granting MCA permission to provide year round service. *See* Appendix I.

Nowhere in the record did the Town attempt to justify its decision on any basis whatsoever, such as, for example, that there is not enough space at the terminal, that MCA's operations would increase noise, or that MCA was an unsafe carrier.

Rather, the Town is attempting to exercise precisely the economic judgment which the Civil Aeronautics Board formerly wielded—the Town has chosen EHA over MCA. That choice is not merely to favor EHA, but to totally destroy MCA and make EHA the sole beneficiary of all of MCA's business. Such a decision is not, and cannot, be shielded from antitrust scrutiny. The decision of the Second Circuit, if it is not reversed, will immunize the actions of airport proprietors in excluding competition under the rationale that it is simply a matter of contract within the proprietary rights of an airport operator. Clearly that was not the intention of Congress.

As stated, sound precedent demonstrates that there is a limitation to the definition of "proprietary powers."[8] Surely Congress did not intend by adopting subsection (b) to render subsection (a) a dead letter. To reach that conclusion this Court must not only ignore all standards of statutory construction, but must also impliedly overrule nearly three decades of sound authority, and finally, discard or at least dismantle the supremacy clause.

In sum, the Town's activities violate 15 U.S.C. §§ 1 and 2. The Second Circuit in effect so found.[9] The Town is not protected from injunctive relief by op-

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[8] *British Airways Board v. Port Authority of New York*, 564 F.2d 1002 (2d Cir. 1977); *United States v. County of Westchester*,

eration of the state action doctrine because the New York Municipal Law relied upon is invalid under the Supremacy Clause of the Constitution of the United States in that it attempts to permit regulation in an area preempted by federal law, namely, 49 U.S.C. § 1305(a).

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in order that the decision of that court be reversed.

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571 F. Supp. 786 (S.D.N.Y. 1983); *United States v. State of New York,* 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd,* 708 F.2d 92 (2d Cir. 1983), *cert. denied,* 466 U.S. 936 (1984); *San Diego Unified Port District v. Superior Court,* 136 Cal. Rptr. 551 (Cal. Dist. Ct. App.), *cert. denied sub nom., Britt v. San Diego Unified Port District,* 434 U.S. 859 (1977); *But see Arrow Air, Inc. v. Port Authority of New York,* 602 F. Supp. 314 (S.D.N.Y. 1985); *Global International Airways Corp. v. Port Authority of New York,* 727 F.2d 246 (2d Cir.), *reh'g denied,* 731 F.2d 127 (2d Cir. 1984); *Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100 (9th Cir. 1981); *National Aviation v. City of Hayward,* 418 F. Supp. 417 (N.D. Cal. 1976).

[9] "We therefore must assume that the New York legislature contemplated the kind of anticompetitive activity in which the Town of East Hampton has engaged." 784 F.2d at 93.

Respectfully submitted,

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Date: June 25, 1986

APPENDIX

APPENDIX A

Docket No.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
MONTAUK-CARRIBEAN AIRWAYS, INC., d/b/a
LONG ISLAND AIRLINES,

Plaintiff,

-against-

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Defendants.

COMPLAINT

JURISDICTION

1. The jurisdiction of this Court is based upon the Sherman and Clayton Acts, 15 USC §§1, 2, 15 and 26; Federal Aviation Act, 49 USC §§1305 and 1349a; Civil Rights Law, 42 USC §1983; and the principles of pendent jurisdiction.

2. The venue of this action is properly before the United States District Court for the Eastern District of New York since all of the parties hereto reside within such district.

BACKGROUND

3. At all times hereinafter mentioned, MONTAUK-CARRIBEAN AIRWAYS, INC. (MCA) was and still is a New

York corporation operating its business as an air carrier within the meaning of §1305 of the Federal Aviation Act involved in interstate commerce and as a fixed base operator (FBO) within the meaning of § 1349a of the Federal Aviation Act at East Hampton Airport, East Hampton, Suffolk County, New York (the Airport), and, since April 1984, doing business under the name LONG ISLAND AIRLINES.

4. Upon information and belief, the defendants PARSONS, FINAZZO, BULLOCK and KING are residents of the Town of East Hampton and, since at least January 1983, have been and still are duly elected councilmen of the Town of East Hampton. Upon information and belief, defendant HOPE is a resident of the Town of East Hampton and, since January 1984, has been and continues to be the duly elected supervisor of the Town of East Hampton who, together with the aforementioned councilmen, constitute the town board which is the governing body of the Town of East Hampton.

5. Upon information and belief, RUSSELL STEIN is a resident of the Town of East Hampton and has been, since January 1984, the Town Attorney of the Town of East Hampton.

6. The Town of East Hampton (the Town) is a municipal corporation located within the County of Suffolk and State of New York and is, and at all times mentioned herein has been, the owner and operator of the Airport.

7. Upon information and belief, CHARLES T. SMITH is a resident of the Town and is, and at all times mentioned herein has been, employed by the Town as the manager of the Airport.

8. Upon information and belief, EAST HAMPTON AIRE, INC. (EHA) is a domestic corporation maintaining its place of business as an FBO at the Airport.

9. Upon information and belief, FRANK LA VIGNA is a resident of the Town, and at all times hereinafter mentioned is and has been the chief executive officer of EHA.

10. Pursuant to the Airport and Airway Improvement Act of 1982 (49 USC §2201 et seq, and specifically 49 USC §2204a, Airport Development and Airport Planning (ADAP)) the Town entered into a Grant Agreement (the Grant Agreement) with the Federal Aviation Administration (FAA), which Agreement is identified as Grant Agreement Project No. 3-36-0024-01-83, Contract No. FA EA2445, which was executed on 29 September 1983.

11. Pursuant to 49 USC §2210 and the Grant Agreement, the Town agreed not to discriminate against any air carrier using the Airport or any fixed base operator located at the Airport and further agreed to grant no exclusive right to any person providing aeronautical services to the public.

12. Pursuant to the Grant Agreement, the Town has received ADAP funding for development and improvement of the Airport.

13. On or about 12 June 1978, the Town entered into a Lease Agreement with EHA (the EHA Lease) under which EHA commenced operations as an FBO at the Airport.

14. Plaintiff had been operating as an FBO and air carrier at the Airport on a year-round basis for over 15 years prior to the execution of the current lease dated 28 December 1979 between plaintiff and the Town (the MCA lease). That lease was denominated "Seasonal Fixed Base Operator's Agreement East Hampton Airport Lease", covered a term from 1 January 1980 through 31 December 1989, directed that certain services must be provided by plaintiff during the period from 1 May through 30 September of each year (the season) and that plaintiff must be prepared to provide all FBO services at any time, but

contained no provision specifically prohibiting any of plaintiff's operations during the period from 1 October through 30 April (the off-season).

15. The annual rent provided in the EHA lease was $15,000.00 per year payable in June of each year plus $.03 per gallon for each gallon of aviation fuel delivered to the Lessee. The annual rent provided in the MCA lease was $15,000.00 per year payable in five equal installments of $3,000.00 per month for each month from May through September of each year plus $.03 per gallon for each gallon of fuel delivered to the Lessee.

16. In 1983, plaintiff planned to continue its air carrier and FBO operations after 30 September but was specifically prohibited from doing so by the Town Board as expressed in a letter from defendant PARSONS dated 28 September 1983.

17. On 18 November 1983, a hearing was held by the Town Board as to whether plaintiff should be allowed to be a year-round operator at the Airport. At that hearing, the Board took testimony from representatives of both plaintiff and EHA.

18. In December 1983, plaintiff submitted to the Town Board a lease amendment executed by plaintiff providing for the immediate elimination of any seasonal restriction on plaintiff's operations, which lease amendment was rejected by the Town Board.

19. Pursuant to the provisions of Rider #2 to the MCA lease, the rent and fees to be paid pursuant to such lease for the second five years thereof were to be renegotiated during 1984. Upon the Town Board's insistence, an entire proposed lease was prepared by the plaintiff and submitted to the Town Board on 25 September 1984. No response in writing has ever been made to such proposed lease.

20. On 1 October 1984, plaintiff attempted to continue its air carrier and FBO operations at the Airport.

21. By letter dated 1 October 1984, STEIN, as Town Attorney, acting ostensibly upon the unanimous direction of the Town Board, notified plaintiff in writing of violation of plaintiff's lease by virtue of the continuance of its operations.

22. Thereafter, by letter dated 22 October 1984, STEIN, as Town Attorney, and ostensibly on the express direction of the Town Board, notified plaintiff of the conditional termination of its lease should it fail, amongst other things, to discontinue all operations at the Airport until 1 May 1985.

23. In order to avoid the termination of its lease, plaintiff discontinued all air carrier operations and all FBO operations at the Airport at the end of October 1984.

24. Plaintiff complained to the FAA as to its treatment by the Town Board, as a result of which the FAA commenced an investigation of the allegation of discrimination at the Airport by reason of the refusal of the Town to allow plaintiff to operate year-round.

25. By letter dated 7 January 1985 to STEIN, THOMAS C. HALLORAN, regional counsel for the FAA notified the Town of the FAA's conclusion that plaintiff is not being treated on fair and reasonable terms and without unjust discrimination in violation of 49 USC §1349 and Assurance 20 of the Town's Grant Agreements with the FAA.

26. On 7 December 1984, the Town Board adopted a resolution directing that a public hearing be held on 18 January 1985 concerning the following questions:

> "1. Whether it is reasonable, prudent and in the best interests of the people of the Town of East Hampton to authorize year-round operation at the Town Airport by more than one (1) fixed-base operator ("FBO").
>
> 2. If the answer to question No. 1 is negative and the Town should continue to limit year-round

> fixed base operations to a single company, whether any such limitation can and will comply with all applicable FAA regulations, including those which appear to permit such a limitation only where:
>
> . . . it would be unreasonably costly, burdensome or impractical for more than one fixed base operator to provide [FBO] services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-base operator and such airport."

27. On 18 January 1985, a public hearing was held before the Town Board, at which time the Board took testimony from representatives of both plaintiff and EHA. No decision thereafter was rendered by the Town Board.

COUNT I

28. During 1983, 1984 and to the present, the defendants have conspired to restrain trade and to create a monopoly for the benefit of defendant EHA, which has caused a substantial lessening of competition and a substantial impact on interstate commerce resulting from loss of sales and profits by plaintiff. Plaintiff has been substantially damaged thereby in its business and property within the meaning of the Anti-Trust Laws of the United States.

29. The prohibition of plaintiff's air carrier operations at the Airport during 1983, and 1984 and to the present by the defendants HOPE, PARSONS, BULLOCK, FINAZZO and KING as the Town Board of the Town and STEIN as the Town Attorney, was in violation of the federal pre-emption as to rates, routes or services of any air carrier as provided in 49 USC §1305 and such action was taken willfully, deliberately, with full knowledge of its

violation of federal law and with the intent of granting to EHA a monopoly to the detriment of plaintiff.

30. The effect of the defendants' actions has been to eliminate air carrier competition at the Airport, to reduce the plaintiff's off-season share of the air carrier business to zero and to reduce plaintiff's year-round market share from 44% in 1980 to 11% in 1984.

31. The actions of the defendants HOPE, PARSONS, BULLOCK, FINAZZO, KING and STEIN in prohibiting off-season air carrier operations of plaintiff during 1983, 1984 and to the present were beyond the statutory authority of those individuals as officials of the Town, and therefore such individuals are personally liable for the damages resulting from their actions.

32. The actions of the defendants HOPE, PARSONS, BULLOCK, FINNAZO and KING, acting as the Town Board of the Town and STEIN as Town Attorney, in prohibiting FBO operations by the plaintiff from January 1984 to the present were in violation of 49 USC §1349a and such actions were taken willfully, deliberately and with full knowledge of the law and with the intention of granting to EHA a monopoly to the detriment of plaintiff.

33. The Town Board empowered SMITH, as Airport Manager, to designate and distribute to plaintiff and EHA, tie-down and aircraft parking spaces for which the FBO's charge daily fees, and which parking and tie-down spaces also generate fuel sales to the aircraft operators.

34. SMITH, acting with the approval of the Town Board and over the objections of plaintiff, during 1983 and 1984 distributed approximately 90% of the tie-down and parking spaces to EHA and the remaining 10% to the plaintiff during the season, and all of the tie-down and all but two of the parking spaces to EHA during the off-season.

35. Commencing in 1983, the defendants PARSONS, BULLOCK, FINAZZO, KING and SMITH, joined by

defendant HOPE in 1984, acted in combination and conspiracy with defendants LA VIGNA and EHA to direct transient business at the Airport to the parking and service facilities of EHA in order to enhance the business of EHA to the detriment of the plaintiff.

36. The actions of the defendants with reference to FBO operations at the Airport have been to create a monopoly for the benefit of the defendant EHA during the off-season, a substantial monopoly for the defendant EHA during the season, and the continuing diversion of business away from the plaintiff to its detriment.

37. During 1983, 1984 and to the present, the defendants have acted to create and enforce a monopoly for the benefit of defendant EHA at the Airport during the off-season and to reduce plaintiff's competitive position during the season to the extent of creating a substantial monopoly for defendant EHA during the entire year in violation of 15 USC §§1 and 2 and have thereby damaged plaintiff.

COUNT II

38. 15 USC §1305 provides for federal pre-emption and prohibits any state or political subdivision thereof from regulating rates, routes or services of any air carrier, thereby prohibiting the Town from denying equal access by the plaintiff to the Airport.

39. 49 USC §1349a prohibits unjust discrimination against an FBO or the grant of an exclusive right to an FBO.

40. The intention and effect of the Federal Aviation Act was to minimize governmental interferences with free competition amongst FBOs at federally funded airports for the benefit of the public and FBOs situated similarly to the plaintiff.

41. As an air carrier and FBO operating at a federally funded airport, plaintiff is part of a group intended to be

benefited by the Federal Law and entitled to redress for violation of its rights by the defendants.

42. In prohibiting plaintiff from operating during the off-season, the defendants violated the assurances required by 49 USC §2210a and the Sponsor's Assurances contained in the Grant Agreement in failing to provide equal access to plaintiff to the use of the Airport and in unfairly discriminating against plaintiff by charging to plaintiff the same annual rent as to EHA but only for five months use.

43. The Town Board through SMITH as airport manager, imposed upon plaintiff a passenger head tax during 1983 and 1984 in deliberate and knowing violation of federal pre-emption under 49 USC §1305 and compelled payment from plaintiff in the amount of $2,200.00.

44. As a result of the actions of the defendants in violation of the provisions of the Federal Aviation Act, plaintiff has been rendered uncompetitive and has suffered great losses in sales and profits.

COUNT III

45. The actions of the defendants HOPE, PARSONS, BULLOCK, FINAZZO and KING as the Town Board, STEIN as the Town Attorney, and SMITH as the Airport Manager, in prohibiting plaintiff's air carrier operations during the off-season of 1983, 1984 and to the present and prohibiting plaintiff's other off-season FBO operations in 1983, 1984 and to the present, violate the terms of the MCA lease which contains no such prohibitions and plaintiff's right to quiet enjoyment of the leased premises.

46. As a result of the aforementioned violations of plaintiff's lease, plaintiff has suffered substantial damage in the form of loss of business and profit, to which it is entitled to recompense.

COUNT IV

47. Commencing in 1983, the defendants PARSONS, BULLOCK, FINAZZO and KING, joined by the defendants HOPE and STEIN in January 1984, combined and conspired with defendants EHA and LA VIGNA to illegally create for defendant EHA a monopoly in air carrier and FBO services at the Airport, and to deliberately and maliciously destroy the business of plaintiff at the Airport.

48. In furtherance of the above mentioned conspiracy, the Board Members, commencing in 1983 and continuing to date, have forwarded to defendant LA VIGNA copies of correspondence from plaintiff and its attorneys, over objections by plaintiff and its attorneys, while failing to answer correspondence from plaintiff and its attorneys.

49. The Town Board, through SMITH as airport manager, in combination with EHA and LA VIGNA, imposed upon plaintiff landing fees which were not required of EHA and defendant SMITH utilized the Airport radio equipment to advertise EHA's fuel sales and services to transient aircraft, resulting in the diversion of a great deal of business from plaintiff to defendant EHA, reassigned plaintiff's tie-down and landing spaces to defendant resulting in loss to plaintiff of the income generated by such tie-down and parking spaces and directed plaintiff to pay to defendant EHA parking and tie-down fees for plaintiff's own aircraft, and authorized the replacement of plaintiff's sign next to the terminal building by a sign from defendant EHA.

50. The defendants harrassed plaintiff by causing criminal charges for environmental pollution to be brought against MICHAEL S. PERAGINE, plaintiff's president, in July of 1984 with knowledge to the involvement of Mr. PERAGINE with plaintiff and on property not leased to plaintiff.

51. Despite repeated requests from plaintiff from May through September 1984, defendant SMITH refused to

supply information demanded, in violation of the Freedom of Information law (New York Public Officer's Law §§84 et. seq.) and further denied the existence of and refused to provide a survey, map or sketch of the Airport which had consistently been in his possession, until 28 September 1984, which document was required in order to try to delineate parking and tie-down spaces.

52. With respect to air carrier operations, the defendants PARSONS, BULLOCK, FINAZZO and KING, acting in concert with and at the behest of defendants EHA and LA VIGNA prohibited plaintiff's air carrier operations during the off-season from 1 October 1983 through 31 December 1983, and thereafter from 1 January 1984 through 30 April 1984, in conjunction with the defendants HOPE and STEIN. Such prohibition was illegal, violative of 49 USC §1305, beyond the authority of the Town Board, known by the defendants to be illegal, and done maliciously and with the intent of destroying plaintiff's business.

53. As a result of defendants' actions, plaintiff's business has been greatly damaged and plaintiff has suffered a substantial loss of sales and profits.

COUNT V

54. The abovementioned actions of the defendants HOPE, PARSONS, BULLOCK, FINAZZO, and KING, acting as the Town Board of the Town, STEIN, acting as the Town Attorney of the Town, and SMITH, acting as the airport manager for the Town, were taken under color of the Town Law of the State of New York and ordinances of the Town of East Hampton and caused the deprivation of plaintiff's rights to operate as an air carrier and FBO under the provisions of the Federal Aviation Act, resulting in damage to plaintiff, all in violation of 42 USC §1983.

Wherefore, plaintiff requests judgment against the defendants as follows:

A. On the first count, that the defendants be adjudged to have violated the antitrust laws of the United States, that the actual damages to plaintiff's business and property resulting from such violations be determined and that plaintiff have judgment against the defendants for three times the amount of the actual damages so determined, together with its costs and a reasonable attorney's fee as provided by law;

B. On the second count, that the defendants HOPE, PARSONS, BULLOCK, FINAZZO and KING, individually and as constituting the Town Board of the Town of East Hampton; STEIN, individually and as the Town Attorney of the Town of East Hampton; and SMITH, individually and as the airport manager of the Town of East Hampton, be adjudged to have violated the Federal Aviation Act, and that plaintiff have judgment for the amount of the damages determined to have resulted from such violations;

C. On the third count, that the Town of East Hampton be adjudged to have violated its lease with the plaintiff and that plaintiff have judgment against the Town of East Hampton for the amount of damages determined to have resulted from such violation;

D. On the fourth count, that defendants be adjudged to have conspired against plaintiff, that the actual damages to plaintiff's business and property be determined, and that plaintiff have judgment against the defendants for three times the amount of such damages and for $10,000,000.00 as punitive damages for such conspiracy;

E. On the fifth count, that defendants HOPE, PARSONS, BULLOCK, FINAZZO, KING, STEIN and SMITH, individually and as officials of the Town of East Hampton be adjudged to have deprived plaintiff of its rights, privileges and immunities under the Constitution and Laws of the United States, and that plaintiff have judgment for the damages to plaintiff's business and property and for legal fees pursuant to 42 USC §1988.

F. A declaration that plaintiff's lease entitles plaintiff to operate as an air carrier and fixed base operator year-round.

F. A permanent injunction against the defendants prohibiting them from interfering with the year-round operation of plaintiff as an air carrier and fixed base operator.

Dated: Melville, New York
8 February 1985

/s/ I. LEONARD FEIGENBAUM
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APPENDIX B

85-CV-420

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a
LONG ISLAND AIRLINES,

Plaintiff,

-against-

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, , RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA

Defendants.

DECISION AND ORDER

BRAMWELL, D. J.

Plaintiff Montauk Caribbean Airways, Inc. d/b/a Long Island Airlines (MCA) commenced this action against members of the Town Board of the town of East Hampton, New York and others. The action is based on the Sherman and Clayton antitrust acts, the Federal Aviation Act, and federal civil rights law. Defendants Hope, Parsons, Bullock, Finazzo, King, Smith and Stein (the Town defendants) collectively move to dismiss the complaint for failure to state a claim. The plaintiff cross-moves for a preliminary

injunction, for an order dismissing defendants East Hampton Aire's (EHA) and LaVigna's counterclaims, and for an order transferring the matter to the federal courthouse in Uniondale, New York. The plaintiff also opposes the Town defendant's motion. Defendants EPA and LaVigna oppose the plaintiff's motion to dismiss their counterclaims.

This action relates to a lease permitting plaintiff MCA to conduct business as a fixed-base operator (FBO) at an airport (the Airport) owned and operated by the Town of East Hampton, New York (the Town). The plaintiff is a New York corporation doing business as an air carrier at the Airport. Defendants Parsons, Finazzo, Bullock and King are councilmen of the Town and sit on the Town Board. Defendant Hope is the supervisor of the Town Board. Defendant Russell Stein is the Town's attorney while the Town employs defendant Charles Smith as manager of the Airport. Defendant Frank LaVigna is chief executive officer of defendant East Hampton Aire (EHA) which operaters as an FBO on a year-round basis at the Airport.

On or about December 28, 1979, the plaintiff and the Town entered into a ten-year lease denominated as a "Seasonal Fixed Base Operator's Agreement East Hampton Airport Lease." The effective span of the lease is from January 1, 1980 to December 31, 1989, and the lease authorizes MCA's FBO activities for only 5 months a year from May 1 to September 30 of each year. In 1983 and 1984, the plaintiff sought to operate beyond the annual September 30 cutoff date for FBO activity under the lease. However, the Town Board informed the plaintiff on each occasion that such activity was not authorized under the lease agreement. On each occasion, the plaintiff ceased operations.

In the fall of 1984, the plaintiff filed a complaint with the Federal Aviation Administration (FAA) charging the Town Board with unjust discrimination pursuant to 49

U.S.C. § 1349, and under the terms of a Grant Agreement between the FAA and the Town. The objective behind the complaint was to compel the Town to grant the plaintiff a full-year lease. On January 7, 1985, after an investigation, the FAA found that the Town's failure to grant the plaintiff a full-year lease was in fact discriminatory. The FAA also allotted the Town 30 days to rectify the situation.

On January 18, 1985, the Town Board held hearings on the question of extending the plaintiff's lease in accordance with the FAA's directive. The Board never issued an opinion or conclusion thereafter.

The instant action was commenced on February 8, 1985 seeking damages for the Town's leasing policy.

The Town defendants move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint for failure to state a claim. The Town defendants argue that the plaintiff's claims under the Sherman Act, the Clayton Act, 42 U.S.C. § 1983, and the Federal Aviation Act are defective. The plaintiff opposes the motion and moves for a preliminary injunction. The plaintiff also moves to dismiss defendants EHA's and LaVigna's first and second counterclaims for defamation. These defendants oppose the plaintiff's motion. For reasons that follow, the Town defendants' motion is denied in part and granted in part. The plaintiff's motion is denied *in toto*.

The Court first turns to the Town defendants' motion to dismiss the complaint to the extent that it is based on the Sherman and Clayton Acts. The Town defendants argue that these acts are of no consequence in this case given the weight of the Local Government Antitrust Act of 1984 and the state action antitrust doctrine. The Court only partially agrees with the Town defendants' position.

The Local Government Antitrust Act of 1974, 15 U.S.C. §§ 34, 35, and 36, provides that:

> [n]o damages, interest on damages costs, or costs, or attorney's fees may be recovered under [the Clayton Act] from any local government, or official or employee thereof acting in an official capacity. 15 U.S.C. § 35(a). AND
>
> the term 'local government' means . . . a city, county, parish, town, township, village, or any other general function governmental unit established by State law. 15 U.S.C. § 34.

The prohibition on antitrust actions under these provisions is sweeping. This is clear from both the plain language of the Act and its legislative history, which indicate that the Act was intended to go further than the federal common law prohibition on such claims.

Here, the Court believes that the Local Government Antitrust Act bars that part of the complaint based on the Clayton Act. First, we are concerned in this case with local government employees and officials as contemplated under the Act. This is apparent as the Town defendants were either connected to the Town's general governmental functions through the Town board and its Attorney's Office, or by virtue of being appointed and employed by the Town. Second, the Town defendants were acting in their official capacities in executing and enforcing the lease in question, and in overseeing airport operations.

However, the court cannot take the same position on the plaintiff's Sherman Act claim. First, despite the Town defendants' assertions, the broad prohibition of the Local Government Antitrust Act does not reach Sherman Act claims. Section 35(a) of Title 15 clearly and exclusively refers to a prohibition of Clayton Act claims under sections 15, 15a and 15c of Title 15. Also, the legislative history refers to a straight and narrow purpose of prohibiting solely Clayton Act suits against localities. In fact, Page 2 of House Report 98-965 on the Act states that the aim

of the legislation is to preclude "suits . . . of the Clayton Act." Nothing in the House Report indicates otherwise.

Having said that, it becomes obvious that the plaintiff's Sherman Act claims may be precluded only under the federal common law state action standard as articulated in *Community Communications Co., Inc. v. City of Boulder.* This U. S. Supreme Court standard is far more strict than the Local Government Act's rule. The *City of Boulder* standard shuns blanket immunity and only protects local government officials performing pursuant to a "clearly articulated and affirmatively expressed" state policy. Such policy must indicate an intent to delegate authority the exercise of which may have an anticompetitive effect. Also, such policy must be actively supervised by the state. Here, the Court is not satisfied that the second leg of this has been satisfied. The Court is not persuaded that New York State authorities actively regulate the Town's management of airport affairs. Since the question of regulation is essentially one of fact, the Court will permit discovery to go forward as to this issue.

Hence, the plaintiff's Clayton Act claims are defective and are dismissed as to the Town defendants. The Sherman Act claims remain open.

The Court now turns to the Town defendants' argument that the complaint fails to state a claim under the Federal Aviation Act. Specifically, the Town defendants contend that the provisions the plaintiff relies on—sections 1305 and 1349 of the Federal Aviation Act—do not provide private causes of action, and that they are left for Federal Aviation Administration to enforce.

The Court agrees. Pursuant to the well-settled principles of *Cort v. Ash,* the mere facts that a federal statute has been violated and a person has been harmed, do not lead to the conclusion that a private cause of action is available. In order to determine whether a cause of action is avail-

able under a statute, the courts will, *inter alia*, turn to legislative history and statutory language for guidance.

In the present case, we are concerned with section 1305 and 1349. Section 1349(a) has been interpreted as prohibiting federally funded airports from discriminating against fixed-based operations. However, the provision does not articulate a private cause of action or mention the availability of court-fashioned remedies. The same is true of section 1305 which concerns federal preemption of authority to regulate air carriers. Also, the Court is aware of no policy underlying either section which suggests that a private right of action exists. More important, however, is the long line of precedent denying any unarticulated private rights of action under the Federal Aviation Act. Judge Curtin of the Western District of New York considered this issue in *Guthrie v. Genessee* where he concluded that the Federal Aviation Act did not provide a private cause of action. Judge Curtin's sound and thorough analysis on this point compels the Court to follow suit. Hence, the plaintiff's Federal Aviation Act claims are dismissed as to the Town defendants.

The Town defendants also move to dismiss the fifth count in the complaint pursuant to Rule 12(b)(6). Count five is brought pursuant to 42 U.S.C. § 1983 for deprivation of rights under the Federal Aviation Act. The Court believes that this count should be dismissed pursuant to the U.S. Supreme Court's decision in *Middlesex County Sewage Authority v. National Sea Clammers*. This decision provides that section 1983 is not available as a remedy for statutory violations if (1) Congress foreclosed private enforcement of a statute in the enactment itself, or (2) the statute at issue is of the type which does not create enforceable rights. The plaintiff's fifth count refers to rights it is purportedly entitled to pursuant to the Federal Aviation Act. However, as the Court has already decided, there is no private right of enforcement under the FAA. Hence, it is beyond doubt that the plaintiff falls into the

first category of cases prohibited under *Middlesex*. Count five is dismissed as to the Town defendants.

The Court now turns to the plaintiff's motion for a preliminary injunction under Rule 65. MCA seeks an injunction preventing the Town defendants from interfering with the plaintiff's support services and operations as an air carrier at the Airport on a year-round basis. The Court will not issue such relief.

The Second Circuit standard for issuance of a preliminary injunction is well-settled. The moving party must demonstrate the probability of immediate irreparable harm and either (1) a likelihood of success on the merits of its claim, or (2) sufficiently serious questions going to the merits making them a fair ground for litigation, and a balance of hardships tipping decidedly in the movants favor. In the recent case of *Citibank v. Citytrust*, the Second Circuit also emphasized that the movant must demonstrate that irreparable harm will result before a decision on the merits is rendered.

In this case, MCA cannot claim that irreparable harm will result before a decision on the merits is rendered. First, based on the FAA letter dated January 7, 1985, the agency may in fact step in between now and September 30 to issue relief. Second, the plaintiff would not be likely to suffer irreparable harm before its 1985 lease term actually expires on September 30, 1985. Between that time and now, the case could easily be disposed of or settled depending on the course pre-trial activities take.

The plaintiff also seeks to dismiss defendants EHA's and LaVigna's counterclaims for defamation. The motion is denied. These defendants have clearly alleged causes of action for defamation with adequate particularity to satisfy Rule 12(b)(6). Further, inasmuch as the plaintiff has offered no 3(g) statement as required under the Local Rules of this district and there has been little or no discovery at

this stage, the Court cannot grant the motion for summary judgment.

Finally, the plaintiff moves to transfer the entire matter to the United States district Court in Uniondale, New York. Rule 4(b) of the Calendar Rules for this district provides:

> *Long Island Case Designations.* Within twenty (20) days after the original assignment, any party may serve and file with *the chief judge* a written request to review the clerk's designation of, or failure to designate, a "Long Island Case." After consultation with the judge to whom the case was assigned, *the chief judge* shall review and determine the propriety of the designation. If the designation is changed then the clerk shall reassign the case in accordance with the determination of the *chief judge.*

Under this rule, any application must be directed to Chief Judge Weinstein.

Accordingly, the Town defendants' motions are granted except that the plaintiff's Sherman act claims may remain open. The plaintiff's motions are denied *in toto.*

IT IS

SO ORDERED.

/s/ HENRY BRAMWELL
U. S. D. J.

Dated: Brooklyn, New York
May 28th, 1985

APPENDIX C

85-CV-420

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Plaintiff,

-against-

JUDITH HOPE, RANDALL PARSONS,
ANTHONY BULLOCK, MICHAEL J. FINAZZO,
and HUGH KING, Individually and as
the Town Board of the Town of East Hampton,
New York, CHARLES T. SMITH, RUSSELL STEIN,
EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Defendants.

DECISION AND ORDER

BRAMWELL, D. J.

Plaintiff Montauk Caribbean Airways, Inc. d/b/a Long Island Airlines (MCA) commenced this action against members of the Town Board of the Town of East Hampton, New York and others. The original complaint was based on the Sherman and Clayton federal antitrust acts, the Federal Aviation Act, and federal civil rights law. On May 28, 1985, this Court considered and rules on the "Town" defendants' motion to dismiss the complaint for failure to state a claim. It also rules on, *inter alia*, the plaintiff's cross-motion for a preliminary injunction. The Town defendants' motion was denied in part and granted in part. The plaintiff's cross-motion for an injunction was denied.

Now, both the Town defendants and the plaintiff move, pursuant to Rule 3(j) of the Civil Rules of the United States District Court for the Eastern District of New York, to reargue portions of their respective motions. For reasons that follow, the Court: (1) grants the Town defendants' motion to reargue and rules in their favor on the merits of their application; (2) grants the plaintiff's motion to reargue in part but denies its application on their merits; and (3) dismisses the complaint for lack of subject matter jurisdiction.

I. FACTUAL AND PROCEDURE BACKGROUND

A. Facts

The Court will merely restate the facts it relied on for its May 28, 1985 decision.

This action relates to a lease permitting plaintiff MCA to conduct business as a fixed-base operator (FBO) and air carrier (carrier) at an airport (the Airport) owned and operated by the Town of East Hampton, New York (the Town). The plaintiff is a New York corporation doing business as an FBO and carrier at the Airport. Defendants Parsons, Finazzo, Bullock and King are councilmen of the Town and sit on the Town Board. Defendant Hope is the supervisor of the Town Board. Defendant Russell Stein is the Town's attorney while the town employs defendant Charles Smith as manager of the Airport. Defendant LaVigna is the chief executive officer of defendant East Hampton Aire (EHA), which operates as an FBO on a year-round basis at the Airport.

On or about December 28, 1979, the plaintiff and the Town entered into a ten-year lease denominated as a "Seasonal Fixed Base Operator's Agreement East Hampton Airport Lease." The effective span of the lease is from January 1, 1980 to December 31, 1989, and the lease authorizes MCA's FBO activities for only 5 months per year from May 1, to September 30 of each year. In the years 1983 and 1984, the plaintiff sought to operate beyond the

annual September 30 cut-off date under the lease. However, the Town Board informed the plaintiff on each occasion that such activity was not authorized under the lease agreement. On each occasion, the plaintiff ceased operations.

In the fall of 1984, the plaintiff filed a complaint with the Federal Aviation Administration (FAA) charging the Town with unjust discrimination pursuant to 49 U.S.C. § 1349, and under the terms of a Grant Agreement between the FAA and the Town. The objective behind the complaint was to compel the Town to grant the plaintiff a full-year lease. On January 7, 1985, after an investigation, the FAA found that the Town's failure to grant the plaintiff a full-year lease was in fact discriminatory. The FAA also alloted the Town 30 days to rectify the situation.

On January 18, 1985, the Town Board held hearings on the question of extending the plaintiff's lease in accordance with the FAA's directive. The Board never issued a final opinion or resolution thereafter. The instant action was commenced on February 8, 1985.

B. Procedure

On May 28, 1985, the Court heard oral argument and ruled on motions presented by the Town defendants and MCA. The Town defendants moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint for failure to state a claim. The Town defendants argued that the plaintiff's causes of action under the Sherman Act, the Clayton Act, 42 U.S.C. § 1983, and 49 U.S.C. §§ 1305 and 1349 were defective. MCA opposed the motion and moved for a preliminary injunction, among other things. The Court: (1) dismissed MCA's Clayton Act claim for damages, costs and fees; (2) dismissed part of MCA's Federal Aviation Act claim; (3) dismissed the plaintiff's claim under 42 U.S.C. § 1983; and (4) denied the plaintiff's motion for an injunction. We left

open MCA's claim for damages and injunctive relief under the Sherman Act and an injunction under the Clayton Act. The Court also did not reach MCA's claim under 49 U.S.C. § 2210(a) of the Federal Aviation Act.

By notice of motion dated June 4, 1985, the Town defendants moved to reargue their motion to dismiss. Their objective is to dismantle the remaining portions of MCA's federal antitrust claims for damages and an injunction. On June 10, 1985, MCA cross-moved for reargument. MCA takes issue with the Court's dismissal of the Clayton Act and § 1983 claims, and its denial of the preliminary injunction. The remainder of this opinion is devoted to the issues raised on reargument.

II. ISSUES TO BE RECONSIDERED

Local Rule 3(j) of the Civil Rules for this Court reads as follows:

> A notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion and shall be served at least the same number of days before the return day as was required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court.

Given the language of this rule, the Court will reconsider the Town defendants' motion to reargue its motion to dismiss the antitrust claims raised by MCA. The Town defendants point out that a recent United States Court decision is dispositive of MCA's claims. Since the plaintiff

has correctly indicated that additional factors should be considered with respect to the dismissal of its section 1983 claim, this claim will also be reconsidered. However, there will be no reargument of the Court's application of the Local Government Antitrust Act of 1974 to this case. Even assuming, *arguendo,* the Act does not apply here, the Court will demonstrate that the plaintiff's federal antitrust causes of action are still barred under the state action doctrine. More importantly, the plaintiff's papers on this issue merely repeat its arguments of May 28, 1985. Finally, there will be no reargument of the denial of the injunction. None of the issues raised by the plaintiff were overlooked. Also, as shall be demonstrated, the Court lacks jurisdiction to issue such an injunction.

There is no need for oral argument here since the parties have adequately outlined their positions in the papers before the Court.

III. THE ANTITRUST CLAIMS

In its May 28, 1985 decision, the Court recognized that the state action doctrine barred antitrust actions against states and their municipalities in many cases. Relying on the state action standard of *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40 (1982), the Court found that where the Town defendants had acted "pursuant to a clearly articulated and affirmatively expressed state policy," the Town had not demonstrated that such policy was actively supervised by New York State authorities. Hence, all of the plaintiff's Sherman Act claim and part of its Clayton Act claim (to the extent injunctive relief was sought) were left standing.

The Town defendants now direct the Court's attention to the decision in *Town of Hallie v. City of Eau Claire,* 105 S. Ct. 1713 (1985). In *Town of Hallie,* the Supreme Court recently ruled that the active state supervision requirement of *City of Boulder* "should not be imposed in cases in which the actor is a municipality." *Id.* at 1720.

Here, of course, the Town defendants are members of the municipality of the Town of East Hampton, New York.

Consequently, the remaining portion of the plaintiff's Clayton Act claim and all of the Sherman Act claim must fall as they are prohibited under the state action doctrine.

IV. THE SECTION 1983 CLAIM

MCA argues that the Court should not have dismissed its section 1983 cause of action. The thrust of MCA's position is that the Court wrongly dismissed the civil rights claim under the rule of *Middlesex City Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981). The Court disagrees.

Section 1983 authorizes suits to redress violations of rights, privileges, or immunities secured by the United States Constitution and federal statutes, if they are perpetrated under color of state law. *Maine v. Thiboutot,* 448 U.S. 1, 6 (1980). However, section 1983 does not apply where Congress has foreclosed private enforcement of a statute through section 1983 in the enactment itself, or where a statute is not of the kind that creates "rights" under section 1983. *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 28 (1981). Here, the plaintiff's civil rights cause of action is based on provisions of the Federal Aviation Act, namely 49 U.S.C. §§ 1305 and 1349(a). Neither of these statutes create rights.

In *Guthrie v. Genessee County,* 494 F. Supp. 950 (W.D.N.Y. 1980), it was explained that section 1349(a) did not create rights. Judge Curtin accurately described the provision as follows:

> Section 1349(a) . . . is . . . in the nature of a law for the protection of the general public, a provision which is *part of a statutory scheme to monitor how federal funds are spent.* Although § 1349 does prohibit exclusive rights to the use of airfields upon which federal monies have been spent,

> this does not constitute as compelling a reason to infer a private remedy *as where a class of persons has been granted certain rights by statute. Id.*, at 959 (emphasis added).

The Court adopts this characterization of the statute.

The Court holds a similar view of section 1305(a). That provision reads, in pertinent part, as follows:

> (a) Preemption. (1) Except as authorized in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation. (2) Except with respect to air transportation (other than charter air transportation) provided pursuant to certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

As its plain language suggests, this statute exists solely for the purpose of establishing the dimensions of the federal government's authority over interstate air transportation. The provision itself does not create rights for air carriers or FBO's nor does it mention these parties. More importantly, the legislative history bears out this interpretation as its primary focus is on the respective spheres of federal and state authority over interstate and intrastate air transportation. Under these circumstances, the Court cannot hold that section 1305(a) creates rights for

air carriers or FBO's. *See* 1978 U.S. Code Cong. and Adm. News, p. 3737.

Consequently, the civil rights claim was correctly dismissed.

V. THE REMAINING FEDERAL CLAIM

Count II of the complaint contains the sole remaining federally based cause of action asserted by MCA. In Count II, MCA alleges that the defendants violated 49 U.S.C. § 2210(a) by discriminating against it. The plaintiff has, however, conceded that it did not purport to seek relief under section 2210(a). "Town Defendants' Reply Memorandum In Further Support Of Their Motion to Dismiss The Complaint And In Opposition To Plaintiff's Motion For A Preliminary Injunction," p. 15. Even so, a claim falling under section 2210(a) cannot withstand scrutiny under the rule of *Cort v. Ash,* 422 U.S. 66 (1975). Section 2210(a) directly concerns the relationship between airports and the Department of Transportation, and not the rights of FBO's and air carriers as against airports. But more importantly, it is the right of the Secretary of Transportation to enforce the provisions of section 2210(a). Private parties share no such right under the statute. Hence, there is no viable cause of action under section 2210.

VI. CONCLUSION

For the foregoing reasons, the plaintiff's federal claims are dismissed. The Court no longer has jurisdiction over this matter since the remaining claims are based on state law and all of the parties are New York State domiciliaries. Consequently, the complaint is hereby dismissed.

IT IS

SO ORDERED.

/s/ HENRY BRAMWELL

U. S. D. J.

Dated: Brooklyn, New York
September 4th, 1985

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 578-August Term 1985
(Argued November 25, 1985
Decided February 14, 1986)
Docket No. 85-7752

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a/ LONG ISLAND AIRLINES,
Plaintiff-Appellant,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,
Defendants-Appellees.

Before:

TIMBERS, PIERCE and MINER,
Circuit Judges.

Appeal by Montauk-Caribbean Airways, Inc. from a judgement entered October 1, 1985 in the Eastern District of New York, Henry Bramwell, *District Judge,* dismissing federal claims against the Town of East Hampton and East Hampton Aire, Inc. for alleged violations of the federal antitrust laws, the Federal Aviation Act and the Fed-

eral Civil Rights Act, and also dismissing pendent state claims.

Affirmed.

I. LEONARD FEIGENBAUM, Melville, N.Y., *for appellant.*

ERIC J. LOBENFELD, New York, N.Y. (Sanford M. Litvack, Valerie A. Cohen, and Donovan Leisure Newton and Irvine, New York, N.Y., on the brief), *for appellees Hope, Parsons, Bullock, Finazzo, King, Smith and Stein.*

THOMAS A. HICKEY, New York, N.Y. (Joseph J. Ceccarelli, and Plunkett and Jaffe, New York, N.Y., on the brief), *for appellees East Hampton Aire, Inc. and Frank La Vigna.*

TIMBERS, *Circuit Judge:*

Appellant Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines, appeals from a judgment entered October 1, 1985 in the Eastern District of New York, Henry Bramwell, *District Judge,* dismissing, pursuant to Fed. R. Civ. P.12(b)(6), federal claims and pendent state claims.

Appellant commenced this action on February 8, 1985 against members of the Town Board of East Hampton, New York; the Town's attorney; the manager of the Town's airport; East Hampton Aire, Inc. ("EHA"), a competitor airline; and the latter's chief executive officer. The complaint alleged violations of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982); the Clayton Act, 15 U.S.C. §§ 15, 26 (1982); the Federal Aviation Act, 49 U.S.C. §§ 1305(a), 1349(a),

2210(a) (1982); and the Federal Civil Rights Act, 42 U.S.C. § 1983 (1982). The complaint also alleged pendent state claims for breach of contract and conspiracy. The action was based on the Town's refusal to allow appellant to serve as an air carrier and fixed-base operator at the East Hampton Airport on a year-round basis. Appellant alleged that the Town and EHA conspired to create a monopoly during the off-season months for the benefit of EHA.

In an order dated May 28, 1985, the district court, pursuant to Fed. R. Civ. P. 12(b)(6), dismissed the Clayton Act, § 1983 and Federal Aviation Act claims. After the Supreme Court's decision in *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713 (1985), and after reargument before the district court, Judge Bramwell dismissed appellant's Sherman Act claim for injuctive relief and the pendent state law claims, and reaffirmed dismissal of the § 1983 claim.

We entered an injunction prohibiting interference with appellant's operations pending this appeal. For the reasons set forth below, we dissolve the injunction which we entered pending appeal and we affirm the judgement of the district court dismissing appellant's claims.

I.

This dispute arises from appellant's desire to obtain a lease permitting it to serve as a year-round fixed-base air carrier operator at he East Hampton Airport owned and operated by the Town of East Hampton. In 1978, appellant and the Town entered into a lease under which appellant was to operate as a fixed-base operator and air carrier at the airport. In December 1979, appellant and the Town entered into a ten-year lease which did not require appellant to provide year-round services. Appellant thereafter operated on a seasonal basis between May 1 and September 30 of each year. In 1983 and 1984, apparently after the arrival of new management, appellant sought permis-

sion to operate after September 30. The Town Board informed appellant that the lease did not authorize such post-seasonal operations.

In the Fall of 1984, appellant filed a complaint with the Federal Aviation Administration (FAA) under 49 U.S.C. § 1349, claiming that the Town of East Hampton unjustly discriminated against appellant. The FAA concluded that the failure to grant a full-year lease was discriminatory. The Town, however, did not act on the FAA decision in favor of appellant.

On February 8, 1985, appellant commenced the instant action, seeking the relief set forth above. Appellees, pursuant to Fed. R. Civ. P. 12(b)(6), moved to dismiss the claims. On May 28, 1985 the district court dismissed the Clayton Act claims for damages on the basis of the Local Government Antitrust Act of 1984, 16 U.S.C. § 35 (Supp. II 1984) (the Act).[1] The court also dismissed the claims asserted under the Federal Aviation Act and § 1983. The court thereafter granted the appellees' motion for written reargument pursuant to Local rule 3(j). In its decision of September 4, 1985, the court, applying the Supreme Court's recent decision in *Town of Hallie v. City of Eau Claire*, _____ U.S. _____, 105 S.Ct. 1713 (1985), dismissed the remaining antitrust claims under the state action doctrine. The court also reaffirmed its decision to dismiss the § 1983 claims; and, finding no private cause of action under the Federal Aviation Act, dismissed those claims as well.

II.

The principal issue raised on appeal is whether the Act or the state action doctrine, or both, bar appellant's an-

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[1] Hereafter in this opinion, when we refer to "the Act," we mean the Local Government Antitrust Act of 1984. When other statutes are referred to, such as the Clayton Act, the Sherman Act, or the Federal Aviation Act, we shall refer to them by name.

titrust action against a municipality which owns and operates a local airport. In determining whether the district court, pursuant to Rule 12(b)(6), properly dismissed appellant's federal claims, we must view the factual allegations in the complaint as true. *Jones-Bey v. Caso,* 535 F.2d 1360, 1362 (2 Cir. 1976).

The complaint alleged that appellees Town and EHA conspired to restrain trade and create a monopoly in favor of EHA in violation of the Clayton and Sherman Acts. Appellant submitted to the Town Board a proposed lease amendment which provided for the elimination of any seasonal restriction on appellant's operation. The Board held a public hearing but reached no formal decision. The lease has not been modified. Appellant argues that EHA has usurped a significant share of appellant's air carrier business.

Judge Bramwell held that the Act barred appellant's antitrust claim for treble damages under the Clayton Act. The Act insulates municipalities and their representatives from monetary claims arising under the antitrust laws. This recently enacted statute provides:

> "No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity."

15 U.S.C. § 35.

Congress enacted this statute prior to the Supreme Court's decision in *Hallie.* Its legislative history reflects the desire of Congress to broaden the shield protecting municipalities from antitrust claims for damages. The statute was enacted, in part, "in response to concern with Supreme Court decisions over the past few years that appear to have limited the extent that antitrust immunity applicable to States will be accorded to local govern-

ments." H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602, 4603. Thus, it is fair to assume that Congress intended greater protection for municipalities than the parameters of the pre-*Hallie* state action doctrine provided.

Appellant argues, however, that, in the absence of an articulated state authorization for the town board members' conduct, appellees were not acting "in an official capacity," and therefore fall outside the protection of the court.

This narrow interpretation, which would provide no better protection than that which the federal common law afforded, is not what Congress intended.

The legislative history of the Act indicates that Congress, concerned with the number of antitrust actions brought against municipalities and the limited immunity available under the then-existing state action exemption, intended that the phrase "acting in an official capacity" be given broad meaning. An affirmative grant of authority is not required.

> "The definition of official local conduct is intended to be as broad as the local government's authority—encompassing 'legislative, regulatory, executive, administrative, or judicial authority' of a local government. The Committee assumes that this authority will most often stem from broad home rule grants, or from more specific State grants of authority to the local entity. The definition thus removes any requirement imposed by the Supreme Court in *Community Communications Co. v. City of Boulder*, [455 U.S. 389 (1978)] that there be a specific and affirmative grant of a State's authority to the local government in every instance."

H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 20-21, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602, 4621-22.

In light of the desire of Congress to grant broad immunity from damages for noncriminal acts by local officials and the authority which New York law grants to municipalities in the operation of local airports,[2] we believe that the district court was correct in holding that appellant failed to state a claim upon which relief can be granted under the Clayton Act for damages against the Town of East Hampton. The Act bars such a claim.

The Act, however, does not apply to claims for injunctive relief under the Sherman Act. *See* 15 U.S.C. § 35; H.R. Rep. No. 98-965, *supra, reprinted in* 1984 U.S. Code Cong. & Ad News 4602, 4603.

The question therefore of whether the court properly dismissed the instant claims must be examined in light of the Supreme Court's decision in *Hallie.* There, certain townships sought injunctive relief, alleging that the City of Eau Claire violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services and by tying such services to sewage collection and transportation services. In holding that the municipality was immune from such antitrust actions, the Court reexamined the line of cases which established the state action immunity doctrine. *Parker v. Brown,* 317 U.S. 341 (1943); *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982).

Hallie broadened the immunity available to municipalities. To be exempt from antitrust violations, municipalities must establish "that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' " *Hallie, supra,* 105 S.Ct. at 1716 (quoting *City of Lafayette, supra,* 435 U.S. at 413). A municipality will be

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[2] *See* N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 & Supp. 1984-85), referred to *infra.*

entitled to the protection of the state action exemption where it "demonstrate[s] that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Hallie, supra,* 105 S.Ct. at 1717.

The *Hallie* Court, however, interpreted broadly a "clear articulation" requirement of state policy. It is not necessary for the state legislature to have stated explicitly that it expected a municipality to engage in conduct having anticompetitive effects. *Id.* at 1718. Rather, if the legislature " 'contemplated the kind of action complained of,' this is sufficient to satisfy the clear articulation requirement of the state action test." *Hallie, supra,* 105 S.Ct. at 1719 (quoting *City of Lafayette, supra,* 435 U.S. at 415). The Court also abandoned the requirement that, to be exempt, the state must supervise actively the municipality's activity. *Id.* at 1721.

In light of the Supreme Court's recent holding with respect to the immunity of municipalities from antitrust violations, we turn to the New York statutes which confer authority on municipalities to operate local airports. Under N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 & Supp. 1984-85), the state legislature authorized local legislative bodies to establish, operate and maintain local airports, to acquire and lease real property, and to enter into exclusive and non-exclusive contracts. Specifically, § 352 provides that a town board operating a local airport may:

> "1. Construct, develop, improve, equip, maintain and operate the same.
>
> 2. Adopt regulations and establish fees or charges for the use thereof, and fix civil penalties for the violation of such regulations and provide for their enforcement.
>
> 3. Provide and charge for all services, concessions or other usual or incidental facilities rendered, conducted or maintained thereat.

4. Purchase and sell aviation petroleum products, aircraft accessories and parts, and provide and charge for the servicing and repairing of aircraft, and for all other services reasonably necessary or incidental to the operation of such airport or landing field.

5. Lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or non-exclusive basis, for the entire operation of such airport or landing field, or of any part thereof, or for the rendering of various services or the conduct of business activities, on or at said airport or landing field subject to the provisions of section three hundred fifty-two-a of this chapter; provided, however, that no such lease or contract shall be made until the governing body of the municipality shall have held a public hearing in respect thereto on at least ten days notice published in two newspapers having general circulation in the municipality, and provided further that any lease of an entire or portion of an airport or landing field, together with the facilities thereon, or contract for the operation of an airport or landing field or portion thereof shall be for a term not exceeding forty years and shall expressly provide that the said airport or landing field shall be used only for aviation purposes and for other purposes required for or necessary to the efficient and successful operation of an airport or landing field, upon such terms as shall require the operation of the same as a public airport or landing field for the general use of the public and for the benefit of such city, county, village or town. . . ."

N.Y. Gen. Mun. Law § 352 (McKinney 1974 & Supp. 1984-85). This delegation of authority declares a state policy that municipal airport operators may enter into exclusive lease arrangements. This effectively replaces competition with regulation. We therefore must assume that the New

York legislature contemplated the kind of anticompetitive activity in which the Town of East Hampton has engaged. In view of this broad statutory authority to enter into exclusive or non-exclusive contracts, it was a foreseeable result that the Town would assert the authority to deny appellant year-long operating rights. Such conduct is a foreseeable consequence of granting to municipalities the power to pursue either anticompetitive action or free-market competition in the area of airport services. The grant of this power is inconsistent with the "neutral . . . state policy." *Hallie, supra,* 105 S.Ct. at 1718. We hold that the *Hallie* state action test therefore was complied with in this case.[3]

Appellant also claims that the state action exemption of *Hallie* is not available because the Federal Aviation Act, 49 U.S.C. § 1305(a), has preempted state law in this area, leaving no state authorization for such anticompetitive activity despite the New York statutes. The provision of the Federal Aviation Act relied upon prohibits a political subdivision from enacting any law or rule "relating to rates, routes, or services of any air carrier. . . ." 49 U.S.C. § 1305(a)(1). This statute, however, explicitly provides that noting in the subsection referred to should be "construed to limit the authority of any State or political subdivision thereof . . . to exercise its proprietary powers and rights." 49 U.S.C. § 1305(b)(1). The relevant inquiry therefore is

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[3] Appellant relies on *Guthrie v. Genessee County Airport,* 494 F.Supp. 950, 955-57 (W.D.N.Y. 1980), where the court held that N.Y. Gen. Mun. Law § 350-57 did not meet the *City of Lafayette* state action test. We are not persuaded that *Guthrie* would be decided the same way after *Hallie. Guthrie* relied in part on the active state supervision requirement which the Supreme Court abandoned in *Hallie.* 494 F.Supp. at 956. *See Hallie, supra,* 105 S.Ct. at 1721. Moreover, the *Guthrie* court applied the then-existing state action test in holding that § 352 did not evince an "unambiguous intent on the part of the state legislature to replace competition with monopolistic public service." 494 F.Supp. at 956. After *Hallie,* the clear articulation test is not so restrictive.

whether the Town of East Hampton was exercising its proprietary rights as owner of the Airport when it refused to modify the ten-year lease to which the parties agreed in 1979.

We find no authority to support appellant's claim that the Town of East Hampton, as owner of the Airport, must allow appellant to serve as a fixed-base operator at the East Hampton Airport year-round. Nor do we find support for appellant's claim that the Town is compelled to lease to appellant the necessary equipment and services that would permit such year-round air service.[4] Absent such authority, the leases are valid exercises of the Town's proprietary rights granted under N.Y. Gen. Mun. Law § 352. The preemption statute, § 1305, reserves to the states and local government this power.

Having held that the Act and the state action doctrine bar the antitrust claims against the Town of East Hampton, there is no basis for holding that East Hampton Aire conspired with the Town to violate the antitrust laws. *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F.2d 52, 56 (1 Cir.), *cert. denied,* 385 U.S. 947 (1966). *See Transport Limousine of Long Island v. Port Authority,* 571 F.Supp. 576 (E.D.N.Y. 1983).

We hold that the court properly dismissed the claims against EHA.

III.

Appellant also asserts that the court erred in dismissing its claims under the Federal Aviation Act. The court held

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[4] Since the state claims were dismissed with the federal claims, we do not address the issue of whether either party is in breach of contract for violation of the December 1979 lease. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966). Appellant claims, for example, that while the lease specifically requires that services be provided only between May 1 and September 30, its silence as to off-season services implies the authority to operate for that portion of the year also. Resolution of this issue is not dispositive of the federal claims.

that there is no private right of action under 49 U.S.C. §§ 1305(a), 1349(a). We agree.

To determine whether there is an implied private right of action under the statute, we apply the factors set forth in *Cort v. Ash,* 422 U.S. 66 (1975). Those factors are whether the plaintiff is a member of the class for whose benefit the statute was enacted; whether Congress intended to create a private right of action; whether a private right of action is consistent with the underlying purpose of the legislative scheme; and whether the matter is traditionally relegated to state law. 422 U.S. at 78. Although regulation of interstate air carrier activity traditionally has been a matter of federal law, congressional intent is the most significant of these factors. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 579 (1979).

We agree with those courts which have decided after careful analysis that a private right of action is not available under § 1349(a). *E.g., Hill Aircraft & Leasing Corp. v. Fulton County,* 561 F. Supp. 667, 673 (N.D. Ga. 1982), *aff'd,* 729 F.2d 1467 (11 Cir. 1984); *Guthrie v. Genesee County Airport, supra,* 494 F. Supp. at 960. The statute provides in pertinent part that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal Funds have been expended." 49 U.S.C. § 1349(a).

The statute contains no explicit designation of fixed-base operators as beneficiaries. Rather, the law was enacted to benefit the general public as part of a statutory scheme to monitor the expenditure of federal funds. *Guthrie, supra,* 494 F. Supp. at 959-60. Moreover, as both the *Guthrie and Hill Aircraft* courts observed, the legislative history of § 1349(a) contains no suggestion that Congress intended to create an implied private right of action.

Section 1305(a) of the Federal Aviation Act is a preemption statute which establishes the federal government's sphere of power over the states in areas of interstate air

transportation. There is nothing to suggest that Congress intended to create an implied private right of action under that statute. *See* H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3737, 3751-52 (statute designed to prevent uncertainties and conflicts where airlines provide both interstate and intrastate service resulting in different passenger fares).

Finally, appellant asserts that the court erred in dismissing its claim under § 1983. The comprehensive enforcement scheme provided in the Federal Aviation Act manifests congressional intent to foreclose an action under § 1983. *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 28 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 19 (1981). Appellant must look to the administrative agency responsible for the enforcement of these provisions. *Caceres Agency Inc. v. Trans World Airways,* 594 F.2d 932 (2d Cir. 1979).

We hold that the district court was correct in dismissing appellant's claims under the Federal Aviation Act and § 1983.

IV.

To summarize: The district court correctly held that the Local Government Antitrust Act of 1984 bars appellant's Clayton Act claims for damages. The broad delegation of authority which N.Y. Gen. Mun. Law §§ 350-357 confers on municipalities in the operation of local airports evidences an intent to displace competition with regulation. The state legislature must have contemplated the kind of anticompetitive conduct that would result. Under *Hallie,* this is sufficient to exempt the Town of East Hampton from both the Clayton and Sherman Act antitrust claims. Since Congress expressed no intent to create private rights of action under the Federal Aviation Act, the court prop-

erly dismissed the claims under the Federal Aviation Act and § 1983.

The injunction pending appeal is dissolved and the judgment of the district court is affirmed substantially for the reasons set forth in Judge Bramwell's opinions of May 28, 1985 and September 4, 1985.

Affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 85-7752

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of March one thousand nine hundred and eighty-six

MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a LONG ISLAND AIRLINES,

Plaintiff-Appellant,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant MONTAUK-CARIBBEAN AIRWAYS, INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk

APPENDIX F

US Department
of Transportation

Federal Aviation
Administration

January 12, 1984

Mr. Randall T. Parsons
Councilman
Town of East Hampton
159 Pantigo Road
East Hampton, New York 11937

Your inquiry of December 15, 1983, to Ms. Alkalay of our New York Regional Office was forwarded to my office for a reply. The questions you have raised are not susceptible to simple answers. Initially, I am certain you understand that while every situation may be factually unique, there are some applicable general concepts.

As a general proposition, the Town of East Hampton as an airport operator, which has received Federal funds, cannot grant exclusive rights or discriminate on economic grounds in its dealings with commercial operators or fixed base operators who wish to use the airport's facilities. To summarily or arbitrarily reject a proposal by an FBO to operate at the East Hampton Airport would violate these concepts which are established by Federal law and part of grant agreements between the FAA and the Town of East Hampton. However, East Hampton does have the right to establish reasonable rules and regulations applicable to all fixed base operators and to apply terms and non-discriminatory basis as well as negotiate the terms and conditions of an agreement or lease between itself and an FBO. In short, while an airport operator cannot summarily or arbitrarily reject a proposal by an FBO to operate at

its airport, at the same time a prospective FBO does not have the right to insist that access to a particular airport be unconditional or on terms and conditions it dictates.

Your second question concerns the effect of the Airline Deregulation Act of 1978 (P.L. 95-504). That Act does have a significant effect on every airport operator, including East Hampton, particularly with respect to the ability, or more precisely the inability, of an airport operator to use or apply economic factors in making decisions regarding use of its facilities by commercial operators. The Deregulation Act amended Section 102 of the Federal Aviation Act of 1958 to explicitly establish the concepts of competitive market forces and maximum reliance on those forces as the basis for commercial air service. [See 49 U.S.C. 1302] Additionally, that Act added section 105 to the Federal Aviation Act which expressly prohibits any State or local governmental body from enacting any law, rule, or regulation related to the rates, routes, or services of any air carrier authorized to operate pursuant to Title IV of the Federal Aviation Act. [See 49 U.S.C. 1305(a)]

I regret that we cannot be more explicit in responding to your questions but since we are not privy to all of the facts and circumstances involved in your specific situation, we must of necessity limit our response to the general concepts outline above. These concepts provide substantial but not unrestricted latitude to both airport operators and fixed base operators to negotiate the terms and conditions of an agreement regarding the use of airport facilities without injecting the Federal government into that process.

Sincerely,

/s/ J. E. MURDOCK III
J. E. MURDOCK III
Chief Counsel

APPENDIX G

US Department
of Transportation

Federal Aviation
Administration

Nov 21 1984

Russel S. Stein, Esq.
Town Attorney
Town of East Hampton
159 Pantigo Road
East Hampton, New York 11937

Dear Mr. Stein:

Complaint of Discrimination at East Hampton Airport

Our Airports Division has concluded its preliminary investigation of Montauk Caribbean Airlines d/b/a Long Island Airlines' complaint of discrimination at East Hampton Airport. As you know, Long Island Airlines alleges that the Town of East Hampton, the owner and operator of East Hampton Airport has refused, among other things, to allow it to operate at the airport on a year-round basis and claims that this refusal constitutes a violation of the grant agreement assurances and the Federal Aviation Act of 1958. Attached are copies of Long Island Airlines' allegations. Our preliminary investigation has focused primarily on the issue of Long Island Airlines' request to provide a year-round service as it is now being forced to cease operations. Our investigation into Long Island Airlines' other allegations is continuing.

Our investigation indicates that Long Island Airlines formally requested permission from the Town of East Hampton to operate on a year-round basis in December 1983. To date, the Town has failed to act on this request. While

our investigators have spoken with several people from the Town, we have been unable to discern any valid reasons for this inordinate delay. We, therefore, consider this delay to be tantamount to a denial of the request.

The Town is obligated by grant agreement with the FAA to operate the Airport "for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination." (Assurance 20, Grant Agreement dated September 29, 1983). It is also prohibited from granting an exclusive right to use of the airport by Section 308 of the Federal Aviation Act of 1958, 49 U.S.C. Section 1349.

We will be forced to conclude that the Town's refusal to grant Long Island Airlines permission to operate on a year-round basis is in violation of its grant agreements and the Federal Aviation Act unless the Town articulates nondiscriminatory reasons for its refusal. We would appreciate your response to Long Island Airlines' allegations within ten days. If we do not hear from you within that time, we shall have no choice but to conclude our investigation without the benefit of your response.

Sincerely,

/s/ THOMAS C. HALLORAN
THOMAS C. HALLORAN
Regional Counsel, AEA-7

APPENDIX H

US Department
of Transportation

Federal Aviation
Administration

January 7, 1985

Russell S. Stein, Esq.
Town of East Hampton
159 Pantigo Road
East Hampton, NY 11937

Dear Mr. Stein:

Montauk-Carribbean Airlines Lease

We have concluded our investigation of Montauk-Caribbean Airlines (MCA), Inc.'s allegation of discrimination at East Hampton Airport by reason of the Town of East Hampton's refusal of MCA's request to operate year-round. In reaching our conclusion, we have carefully considered MCA's allegations, as well as the Town's response, the history of correspondence between the parties and the results of our Airports Division investigation of this matter.

Based on our review, we have determined the facts to be as follows:

1. MCA presently has a ten-year lease to operate as an air taxi and a fixed base operator (FBO) at East Hampton Airport from May 1 through September 30. The lease term ends in December 1989. MCA has an option to renew the lease for an additional ten years at a rate to be agreed upon in 1989.

2. While the lease is a seasonal lease, it does require MCA to assume year-round operation in the event the present year-round FBO ceases to operate.

3. MCA has sought for more than one year to operate from October 1 through April 30 or, in other words, to operate year-round.

4. MCA formally requested permission to operate year-round in December 1983, by presenting to the Town an amendment to its current lease. The amendment would have provided for year-round operation effective on the date of signing.

5. MCA's proposed amendment was not executed by the Town.

6. By letter dated December 15, 1983, the Town offered MCA a year-round lease effective October *1985*, without any explanation of the reasons for their delay.

7. By letter dated January 24, 1984, MCA, through its attorney Stuyvesant Wainwright II, indicated that it was amenable to commencing year-round status on October 1, 1984. The letter also raised several other issues regarding the Town's offer which are not relevant to this investigation.

8. To date, the Town has refused to allow MCA to begin immediate year-round operations. In its response to MCA's allegations, the Town cites, among other things, MCA's failure to provide it with a draft lease, although it is clear that MCA did provide the Town with a draft amendment ot the lease. The Town also cites MCA's failure to halt operations in October 1984. This, however, cannot be construed as reasons for failing to approve the proposed lease amendments in the ten months preceding this date.

9. The Town has scheduled a public hearing for January 18, 1985, to determine whether a second year-round FBO is in the best interests of the Town and, if it is not, whether the Town can limit year-round fixed base operations cnsistent with federal law. The Town's decision to hold a public hearing, after offer-

ing MCA a year-round lease beginning in October 1985, can only be construed as another delaying attempt by the Town.

We conclude from these facts that the Town's refusal for more than one year to grant MCA permission to operate year-round without substantive reasons, is tantamount to granting the present year-round FBO an exlusive right from October 1 through April 30 and indicates that MCA is not being treated on fair and reasonable terms and without unjust discrimination. We believe this constitutes a violation of Section 308 of the Federal Aviation Act of 1958, 49 U.S.C. Section 1349, and a violation of Assurance 20 of the Town's grant agreements with the Federal Aviation Administration.

If the Town does not rectify this situation within thirty days, we will have no choice but to find the Town of East Hampton in non-compliance with its grant agreements.

Sincerely,

/s/ THOMAS C. HALLORAN
THOMAS C. HALLORAN
Regional Counsel

APPENDIX I

US Department
of Transportation

Federal Aviation
Administration

Apr 9 1985

Sanford M. Litvack, Esq.
Donovan, Leisure, Newton & Irvine
30 Rockerfeller Plaza
New York, New York 10112

Re: East Hampton—Montauk-Caribbean

Dear Mr. Litvack:

As I am sure you know, the Federal Aviation Administration has received a complaint by Montauk-Caribbean against the Town of East Hampton. The allegations contained in that complaint are both serious and significant in terms of Federal issues.

Recently, we have been provided with copies of various correspondence passing between you and Mr. Feigenbaum, counsel for Montauk-Caribbean, as well as copies of various newspaper accounts of public statements concerning this controversy. We see in those statements and in your letter of March 15, the potential for perhaps resolving at least one of the pending issues, specifically the ability of Montauk-Caribbean to obtain access to the East Hampton Airport in order to conduct its air carrier flight operational activities.

Your letter indicates that you view Montauk-Caribbean as having two separate and distinct roles, one as air carrier and one as a fixed base operator (FBO). In the former role, you indicate that "it is at best an open question as to whether your client [Montauk-Caribbean] was ever told

it could not operate as an air carrier (as opposed to an FBO) on a year-round basis." In the Southampton Press of January 24 Mr. Stein, the East Hampton Town Attorney, is reported to have indicated that the Town has no objection to Montauk-Caribbean providing year-round service to the airport.

If an accurate understanding of the position of the Town of East Hampton is that Montauk-Caribbean may operate at East Hampton as an air carrier with a right to provide all of the support services to itself (fueling, ground handling, baggage, counter space, etc.), we see no reason why Montauk-Caribbean could not start such service immediately. Your letter of March 15 indicated that before providing such service Montauk-Caribbean should provide the Town with its service plans, including proposed schedule, flight plans, equipment to be used and other relevant information following receipt of which the Town would be willing to meet with Montauk-Caribbean in an effort to resolve the issue. We would call your attention to Section 105 of the Federal Aviation Act of 1958, as ammended by the Airline Deregulation Act of 1978 [49 U.S.C. 1305]. The statute very clearly points out that no local political body such as a state or muncipality "shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Since the Town of East Hampton is without authority to regulate the "rates, routes, or services of any air carrier," we do not understand the Town's need for information concerning Montauk-Caribbean's proposed schedule, flight plans, etc., as a prerequisite to "an effort to resolve the issue amicably." In fact, assuming the position of the Town vis-a-vis Montauk-Caribbean in its role as an air carrier is that they can operate at the East Hampton Airport on a year-round basis, we see no issue as to their initiation of such service.

If our assumption, or interpretation and understanding of your letter and the position of the Town is erroneous, we

would appreciate your advising us of that as soon as possible. In that circumstance, we would also appreciate your advising us of exactly what the Town's position is on this issue and the basis for that position.

We realize there is an extensive history to this controversy. We are interested in finding out if there is a way to effect a resolution of these issues. It appears to us that resolution of Montauk-Caribbean's rights to operate as an air carrier are resolvable easily and quickly. We recognize that the question of its right to serve East Hampton as an FBO, i.e., its offering of its ground-handling services to third parties, may not be as readily resolved. If the issue of Montauk-Caribbean's air carrier operations can be resolved, perhaps it may lead to further solutions, and the FAA is willing to assist in that process.

In order to prevent any misunderstanding or confusion, I have taken the liberty of sending a copy of this letter to Mr. Feigenbaum. From our perspective, we consider this letter to be a matter between counsel for the purpose of exploring the potential for resolving issues and, therefore, do not intend to get involved in any publicity or other public debate with respect to either our views and opinions or characterizing the views and opinions of either the Town or Montauk-Caribbean.

Sincerely,

/s/ J. E. MURDOCK III
J. E. MURDOCK III
Chief Counsel

cc: I. Leonard Feigenbaum, Esq.

APPENDIX J

U.S. CONSTITUTION ARTICLE VI

Clause 2. Supreme law.
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15 USCS

§ 1. Trusts, etc., in restraint of trade illegal; penalty
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, Title VII, § 1, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282, Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, § 2, 89 Stat. 801.)

§ 2. Monopolizing trade a felony; penalty
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred

thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708.)

§ 26. Injunctive relief for private parties; exception
Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [15 USCS §§ 13, 14, 18, and 19], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunctive improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven [49 USCS § 1 et seq.] in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.)

42 USCS

§ 1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be sub-

jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

49 USCS

§ 1305 Federal preemption

(a) Preemption. (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act [49 USCS §§ 1371 et seq.] to provide interstate air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 401 of this Act [49 USCS § 1371], the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

(b) Proprietary powers and rights. (1) Nothing in subsection (1) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to

exercise its proprietary powers and rights.

(2) Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.

(c) Existing State authority. When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under title IV of this Act [49 USC §§ 1371 et seq.], until modified, suspended, amended, or terminated as provided under such title.

(d) Definition. For purposes of this section, the term "State" means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and any territory or possession of the United States.

Aug. 23, 1958. P. L. 85-726, Title I, § 105, as added Oct. 24, 1978, P.L. 95-504, § 4(a), 92 Stat. 1708.)

§ 1359. Solicitation of funds and distribution of literature; regulations.

(a) The Administrator of the Federal Aviation Administration (hereinafter referred to as the "Administrator") shall, within 90 days after the date of enactment of this Act [enacted Feb. 15, 1980], promulgate regulations for airports operated by the Administration to regulate the access to public areas by individuals or by religious and nonprofit organizations (as defined in section 501(c)(3) of the Internal Revenue Code of 1954) [26 USCS § 501(c)(3)] for the purpose of soliciting funds or distributing materials.

(b) In promulgating regulations under this section the Administrator shall consider requiring any individual or organization described in subsection (a) to submit an application for a permit to engage in the soliciting of funds or the distribution of materials. In considering such an application the Administrator may require that—

(1) a responsible individual representative of the applicant shall be designated to represent the organization.

(2) each individual participating in any solicitation or distribution will display a proper identification approved by the Administrator,

(3) the number of individuals engaged in any solicitation or distribution at any one time shall not exceed a reasonable number, in keeping with the need for free movement in and operation of the airports as provided for by the permit,

(4) the solicitation or distribution be confined to limited areas and times, and

(5) no individual or organization which holds a permit under this section shall be permitted to—

(A) use sound amplification or display signs (other than signs approved by the Administrator);

(B) intentionally interfere with users of the airport;

(C) engage in the use of indecent or obscene remarks or conduct;

(D) engage in the use of loud, threatening, or abusive language intended to coerce, intimidate or disturb the peace.

(c)(1) The Administrator shall consider requiring that a copy of a permit (if such is required) be conspicuously posted in the area in which any solicitation or distribution is permitted.

(2) The Administrator shall consider whether revocation of approval for any permit if required and approved under this section should occur for any violation of any rule or regulation promulgated hereunder.

(d) Regulations intended to be promulgated under this section shall be submitted to Congress within 30 days after the date of enactment of this Act [enacted Feb. 18, 1980].

(Feb. 15, 1980, P. L. 96-193, Title V, § 501, 94 Stat. 58.)

§ 1506. Remedies not exclusive.

Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

(Aug. 23, 1958, P. L. 85-726, Title XI, § 1106, 72 Stat. 798).

§ 2210. Project sponsorship

(a) Sponsorship. As a condition precedent to approval of an airport development project contained in a project grant application submitted under this title, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscrimination and substantially comparable rates, fees, rentals, and other charges and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classification such as tenants or nontenants, and combined passenger and cargo flights or all cargo flights, and such classification or status as tenant

shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on tenant air carriers, and (B) each fixed-based operator at any airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport utilizing the same or similar facilities, and (C) each air carrier using such airport shall have the service itself or to use any fixed-based operator that is authorized by the airport or permitted by the airport to serve any air carrier at such airport;

(2) there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if if would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport;

(3) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(4) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(5) appropriate action, including the adoptions of zoning laws has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes

compatible with normal airport operations, including landing and takeoff of aircraft;

(6) all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, charge may be made for a reasonable share, proportion to such use, of the cost of operating and maintaining the facilities used;

(7) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control or navigation activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(8) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection, except that no part of the Federal share of an airport development or airport planning project for which a grant is made under this title or under the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate base

in establishing fees, rates, and charges for users of that airport;

(10) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request;

(11) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request;

(12) all revenues generated by the airport, if it is a public airport, will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property: Provided, however, that if covenants or assurances in debt obligations previously issued by the owner or operator of the airport, or provisions in governing statutes controling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all other revenues generated by the airport shall not apply; and

(13) the airport operator or owner who receives a grant for the purchase of land for noise compatibility purposes which is conditioned on the disposal of the acquired land at the earliest practicable time will, subject to the retention or reservation of any interest or right therein necessary to insure that such land is used only for purposes which are compatible with the noise levels of the operation of the airport, use its best efforts to so dispose of such land. The proceeds of such disposition shall be (A) refunded to the United States for the Trust Fund on a basis proportionate to the United State share of

the cost of acquisition of such land, or (B) reinvested in an approved project, pursuant to such regulations as the Secretary shall prescribe.

(b) Compliance. To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this title, as the Secretary considers necessary. Among other steps to insure such compliance, the Secretary is authorized to enter into contracts with public agencies on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, the Secretary is authorized to relieve the sponsor from any contractual obligation entered into under this title, the Airport and Airway Development Act of 1970, or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent the Secretary finds that space no longer required for the purposes set forth in paragraph (7) of subsection (a) of this section.

(c) Consultation. In making a decision to undertake any airport development project under this title, each sponsor of an airport shall undertake reasonable consultations with affected parties using the airport at which such project is proposed.

(Sept. 3, 1982, P. L. 97-248, Title V, § 511, 96 Stat. 686.)

N.Y. Gen. Mun. Law § 352

(McKinney 1974 & Supp. 1984-85)

"1. Construct, develop, improve, equip, maintain and operate the same.

2. Adopt regulations and establish fees or charges for the use thereof, and fix civil penalties for the violation of such regulations and provide for their enforcement.

3. Provide and charge for all services, concessions or other usual or incidental facilities rendered, conducted or maintained thereat.

4. Purchase and sell aviation petroleum products, aircraft accessories and parts, and provide and charge for the servicing and repairing of aircraft, and for all other services reasonably necessary or incidental to the operation of such airport or landing field.

5. Lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or non-exclusive basis, for the entire operation of such airport or landing field, or of any part thereof, or for the rendering of various services or the conduct of business activities, on or at said airport or landing field subject to the provisions of section three hundred fifty-two-a of this chapter; provided, however, that no such lease or contract shall be made until the governing body of the municipality shall have held a public hearing in respect thereto on at least ten days notice published in two newspapers having general circulation in the municipality, and provided further that any lease of an entire or portion of an airport or landing field, together with the facilities thereon, or contract for the operation of an airport or landing field or portion thereof shall be for a term not exceeding forty years and shall expressly provide that the said airport or landing field shall be used only for aviation purposes and for other purposes required for or necessary to the efficient and successful operation of an airport or landing field, upon such terms as shall require the operation of the same as a public airport or landing field for the general use of the public and for the benefit of such city, county, village or town. . . .

No. 85-2102 (2)

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Date: August 11, 1986

Questions Presented

1. Is this case so exceptional as to warrant deviation from the general rule that the Supreme Court will not decide issues that were not pressed in, or determined by, the courts below?

2. Whether a fixed base operator, which is a member of the industry regulated by the federal aviation laws, may assert a private right of action under the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2210 ("AAIA"), or under the Civil Rights Act, 42 U.S.C. § 1983, for an alleged deprivation of rights under the AAIA, where that statute confers no enforceable rights and where, in addition, the AAIA is part of an intricate and comprehensive regulatory and enforcement scheme, which explicitly provides for private remedies only in certain cases, not including the one at issue here?

3. Whether New York's General Municipal Law §§ 350-357 (McKinney 1986), which permits municipal airport operators to enter into exclusive lease arrangements, is void on its face as being in violation of the Supremacy Clause of the United States Constitution, where the federal law with which it is purportedly in conflict expressly provides that it shall not be construed to limit a municipality's authority, as the owner or operator of an airport, from exercising its "proprietary powers and rights" (49 U.S.C. § 1305(b)).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as The Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSEL STEIN, EAST HAMPTON AIRE, INC., and FRANK LAVIGNA,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of the Town Respondents, which consist of Judith Hope, Randall Parsons, Anthony Bullock, Michael J. Finazzo, Hugh King, Charles T. Smith and Russell Stein, and the Private Respondents, which consist of East Hampton Aire, Inc. and Frank LaVigna, in opposition to the

Petition of Montauk-Caribbean Airways, Inc. ("MCA") for a writ of certiorari.

STATEMENT OF THE CASE

The pertinent facts of record are set forth in the opinion of the court of appeals.* However, in light of the arguments advanced in MCA's Petition which were not raised in the lower courts, as well as certain significant developments concerning MCA's pursuit of its claim before the Federal Aviation Administration ("Aviation Administration"), summarized below are the more significant facts.**

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* That opinion is set forth as Appendix D to MCA's Petition for a Writ of Certiorari, dated June 25, 1986 ("Pet."), at pages 31a - 44a.

** The Town Respondents moved in the district court to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and, hence, offered no evidence to

[Footnote continues]

A. The Parties

MCA is a private New York corporation which, for a number of years, has been doing business as an air carrier and fixed base operator ("FBO")* at the

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[Footnote continued]

contradict MCA's allegations concerning their conduct. When MCA moved in the court of appeals for an injunction pending appeal (which was eventually granted by stipulation of the parties), the Town Respondents submitted evidence demonstrating MCA's persistent violations of its lease at the municipal airport at issue in this lawsuit. The statement of facts set forth below is, however, limited to those facts as to which there is no dispute.

* The parties agree that an FBO is a provider of general aviation products, facilities and services at an airport including, among other things, repairs, aircraft fuel, maintenance, tie-downs and parking (Pet., p. 3). It is only with respect to MCA's FBO (as opposed to air carrier) services that it is not permitted to operate year round (Pet., pp. 3-4). With respect to scheduled airline flights, there is no dispute that MCA can and does operate on a year-round basis at the East Hampton airport (Id.).

airport owned and operated by the Town of East Hampton (the "Town"), a summer resort community on Long Island, New York (the "Airport"). Prior to 1979, MCA operated at the Airport on a year-round basis. However, in 1979 MCA's management expressly requested of the Town that it be permitted to change to a seasonal status, and, as a result, since December 1979, MCA has been operating as an FBO pursuant to a lease agreement that is expressly denominated as "Seasonal." The lease defines the parties' rights and obligations by reference to the season of the year, which is divided into the periods from May 1 through September 30 (the "season"), and from October 1 through April 30 (the "off-season").

At all relevant times, respondents Parsons, Finazzo, Bullock and King were duly elected Town councilmen who,

together with respondent Hope, its duly elected Supervisor, constitute the Town's governing body. At all relevant times, Russell Stein was the Town Attorney and Charles Smith was employed by the Town as the Manager of the Airport.

Respondent East Hampton Aire, Inc. is a domestic corporation which, since June 1978, has operated year-round as an air carrier and FBO at the Airport. Frank LaVigna is the chief executive officer of that company.*

B. The Underlying Dispute

In 1983 and again in 1984, MCA decided that it wished to resume operating on a year-round basis, notwithstanding the seasonal lease it had earlier requested. In each of those years, MCA

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* East Hampton Aire, Inc. and Frank LaVigna are collectively referred to herein as "EHA."

attempted to continue its FBO operations at the Airport beyond the last day of the season, but was advised by the Town that continuation of those operations would violate MCA's lease. MCA took no legal action in either of those years to dispute or seek resolution of the Town's position.

Four months after its last request, on February 8, 1985, MCA filed the complaint in this action, alleging violations of the antitrust laws (the Sherman Act, 15 U.S.C. §§ 1, 2 and the Clayton Act, 15 U.S.C. §§ 15, 26); the Federal Aviation Act ("FAA") (49 U.S.C. §§ 1305(a), 1349(a)); and the Civil Rights Act (42 U.S.C. § 1983), the alleged violations of which were premised upon the alleged denial of

rights under the FAA.* The complaint also alleged pendent state claims for breach of contract and conspiracy. As to all pleaded causes of action, MCA sought both damages and injunctive relief.**

C. The Proceedings Below

On March 20, 1985, the Town Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting, as to the antitrust claim, that the

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* As set forth more fully below, while Section 2210 of the AAIA was mentioned in the complaint, MCA expressly disclaimed that it was alleging a cause of action, or seeking relief, under that provision.

** In addition to the federal action, MCA has also filed a suit for damages against the Town in state court, which was dismissed; MCA has moved for reconsideration. The Town commenced a suit against MCA in state court for violations of MCA's FBO lease. That suit was also dismissed, and the Town has filed a notice of appeal.

Town Respondents were immune;* as to the FAA claim, that there was no private right of action under 49 U.S.C. §§ 1305 or 1349(a); as to Section 2210 of the AAIA (which, as noted above, was mentioned in the complaint), that there was no private right of action; and as to Section 1983, that it was unavailable to redress an alleged deprivation of rights under the FAA, because Congress did not intend to create enforceable rights in favor of MCA under that statute, and the FAA's enforcement scheme is so comprehensive that it demonstrates a congressional intent to preclude a Section 1983 remedy.

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* With respect to MCA's claim for antitrust damages, the Town Respondents also argued that the claim was barred under the Local Government Antitrust Act of 1984, 15 U.S.C. § 35. They prevailed on that issue in both the district court and the court of appeals (Pet., pp. 16a-18a; 34a-37a), and MCA has not sought review of that issue in this Court. Hence, the Town Respondents do not address it herein.

MCA opposed the Town Respondents' motion, except insofar as it was directed to Section 2210 of the AAIA. As to that provision, MCA stated the following:

> "However, it appears that defendants have misapprehended the intent of the complaint which makes no claim under 49 U.S.C. § 2210. While reference to that statute is made in the body of the complaint, it is not listed in paragraph 1 of the complaint nor is any relief sought under it. It is therefore unclear why defendants are attempting to establish the absence of a right of action under 49 U.S.C. § 2210 when no such right has been claimed by plaintiff."*

In an order dated May 28, 1985, the district court dismissed the Clayton Act, Civil Rights Act, and FAA claims.**

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* Plaintiff's Memorandum of Law in Opposition to Town Defendants' Motion to Dismiss and in Support of Motion for a Preliminary Injunction, docketed May 8, 1985, p. 14.

** In accordance with MCA's representation that it was not asserting an

[Footnote continues]

On September 4, 1985, after the Town Respondents moved for reargument based upon this Court's decision in Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S. Ct. 1713 (1985) ("Hallie"), the district court dismissed the anti-trust claim for injunctive relief, along with the pendent state claims. In addition, while expressly noting plaintiff's concession that it did not purport to seek relief under Section 2210, the district court noted in dictum that there was no private right of action under that section in any event (Pet., p. 29a).

MCA thereafter appealed the district court's order of dismissal to the United States Court of Appeals for

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[Footnote continued]

action under the AAIA, the district court's May 28 decision did not even address the issue of whether there was a private right of action under that statute.

the Second Circuit which, in a well-reasoned unanimous opinion, affirmed the district court's determination. As to the antitrust claim, the court held that, under the test recently articulated in Hallie, the Town Respondents' conduct was immune from attack under the antitrust laws (Pet., p. 37a-41a). In support, the court cited New York's General Municipal Law § 352 (which authorizes municipalities to enter into exclusive and nonexclusive contracts at airports), and held that this specific delegation of authority declared a state policy that municipal airport operators may enter into lease arrangements which "effectively replace[ ] competition with regulation" (Pet., p. 39a). Hence, the court reasoned, the New York legislature "contemplated the kind of anticompetitive activity in which the Town of East

Hampton has engaged," which was the denial to MCA of a year-round lease (Pet., p. 40a).*

The court next addressed MCA's claims under Sections 1305 and 1349(a) of the FAA, and upheld the district court's determination that, under the well settled legal principles of Cort v. Ash, 422 U.S. 66 (1975), there is no private right of action under either section. As to the Section 1983 claim, the court held, under the reasoning of this Court's decisions in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 28 (1981) ("Pennhurst") and Middlesex County

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* The court did not find, as MCA suggests (Pet., p. 20), that the Town's activities "violate 15 U.S.C. §§ 1 and 2". Rather, the court held that, to the extent the Town's conduct was "anticompetitive," it was done pursuant to statutory permission to regulate, and was therefore immune from the Sherman Act (Pet., pp. 40a-41a).

Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 19 (1981), ("Middlesex"), that a Section 1983 action was foreclosed because "[t]he comprehensive enforcement scheme provided in the Federal Aviation Act manifests congressional intent to foreclose an action under § 1983" (Pet., p. 43a), leaving MCA to look to the Aviation Administration, the agency responsible for enforcement of these provisions.

D. The Current Aviation Administration Investigation

After the Second Circuit's decision but before MCA petitioned this Court, on April 21, 1986 the Administration issued an Order of Investigation. Its stated purpose was to determine if the Airport had violated either FAA § 1349(a), or certain of the assurances contained in a grant agreement entered into between the Airport and the Aviation

Administration pursuant to Section 2210's predecessor provision. The Aviation Administration Presiding Officer in these proceedings has ruled that the issues for determination are, among others, whether (and, if so, why) MCA operates at the Airport under terms and conditions other than those applicable to other air carriers and FBO's, including such particular issues as whether there are differences in treatment concerning rental charges and allocation of tie-down spaces. To date documents have been subpoenaed and produced, and four days of testimony on the record have been taken. The investigation is ongoing, and will result in a decsion by the Aviation Administration whether to issue a formal complaint against the Town.*

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* MCA apparently decided to pursue its administrative option in October 1984,

[Footnote continues]

REASONS FOR DENYING THE PETITION

1. In the lower courts, MCA expressly disclaimed that it was seeking relief under AAIA § 2210, the statute for

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[Footnote continued]

and communicated with the Aviation Administration, on an ex parte basis, by forwarding to the agency certain correspondence exchanged between the Town and MCA. The Aviation Administration conducted a preliminary investigation, without the formal participation of the Town, after which a preliminary finding was issued. Some material relating to this investigation is included in the appendix to MCA's Petition. In January 1985, the Town held a public hearing on the issue of MCA's FBO lease, in conjunction with which it received lengthy and comprehensive reports. On February 27, 1985, the Town requested from the Aviation Administration an extension of time until April 30, 1985 to make a determination concerning MCA's lease, and requested a meeting with the Aviation Administration to discuss the matter. By that time, MCA had commenced the instant lawsuit. Contrary to MCA's assertion (Pet., p. 12), the Aviation Administration did not find that the Town was discriminating against MCA; that is the very issue now being considered.

which it seeks review in this Court, and never raised the other issue for which review is sought.

In the district court and in the court of appeals, this case concerned whether a fixed base operator who, having agreed seven years ago to operate on a "seasonal" basis at a municipal airport but is now desirous of operating year-round, may seek that relief in federal court, by suing under FAA §§ 1349(a) and 1305. Both courts determined that there is no private right of action under either provision, a conclusion MCA now concedes was correct (see Pet., p. 14). MCA now shifts gears, and attempts to raise an entirely new issue in its Petition, asserting that this case concerns an alleged violation of Section 2210 of the AAIA, a statute which, by MCA's own concession (see Pet., p. 11), is entirely different from the FAA. Such a cause of

action is nowhere pleaded in the complaint; MCA expressly told the district court it was not asserting such a claim; and MCA never raised the issue on appeal. Hence, the court of appeals never addressed it.

Similarly, with two courts having determined that, under Hallie, the Town Respondents are immune from antitrust attack by virtue of the delegation of authority embodied in New York's General Municipal Law, MCA takes another wholly new tack in its Petition. It now claims that the New York statute must be struck down as violating the Supremacy Clause of the United States Constitution. However, this relief is nowhere mentioned in the complaint, as MCA has itself conceded,* and the issue was not raised

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* The first mention of the Supremacy Clause was in MCA's Petition for

[Footnote continued]

by MCA in the district court or before the panel hearing the appeal; nor was it decided by either court.

2. The decision below announced no novel rule of law, did not signal a conflict in the circuits, and was in all respects correct.

The decision below was fully consistent with the decisions of this Court and all courts of appeals on the issues actually raised by MCA. The Second Circuit's decision did not announce a novel rule of law, address a question of first impression, signal a conflict

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[Footnote continued]

Rehearing En Banc in the Second Circuit, in which MCA sought leave to amend its complaint to incorporate such a claim. See Petition for Rehearing, p. 11 ("At worst, appellant should be granted leave to amend to incorporate claims under the Supremacy . . . clause.")

in the circuits or, indeed, implicate any of the other considerations normally warranting review by this Court. MCA does not claim otherwise but, instead: (i) pleads that the lower court determinations have worked an injustice upon MCA, which can only be righted by this Court; and (ii) urges that this Court should consider, in each and every instance, legal issues nowhere raised below, which MCA has never plead and which, in some instances MCA has expressly disavowed. For the reasons set forth more fully below, neither of these bases merits this Court's review by writ of certiorari.

THERE ARE NO EXCEPTIONAL CIRCUMSTANCES WARRANTING REVIEW OF ISSUES NOT RAISED OR DETERMINED BELOW

As this Court stated in McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940), the Supreme Court

ordinarily does not decide questions not raised or resolved in the lower court. Rather it is only in "exceptional" cases that questions not pressed or passed upon below will be decided. Id. This is not such a case.

I. The Newly Asserted Claims Under Section 2210 of the AAIA and Section 1983

As noted above, MCA did not purport to plead a cause of action under Section 2210. Indeed, it expressly disavowed in the district court that it was seeking relief pursuant to that provision. Hence, in the absence of exceptional circumstances, the existence of a private right of action under Section 2210 should not be reviewed by this Court.

There are no exceptional circumstances here. First, the overwhelming

weight of authority supports the proposition that, under the well settled principles of Cort v. Ash, supra, 422 U.S. 66, and its progeny, there is no private right of action under Section 2210. See Arrow Airways, Inc. v. Dade County, 749 F.2d 1489, 1491 (11th Cir. 1985); Interface Group v. Massachusetts Port Authority, 631 F. Supp. 483 (D. Mass. 1986); Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667 (N.D. Ga. 1982), aff'd 729 F.2d 1467 (11th Cir. 1984). Indeed, respondents are aware of no case holding to the contrary.*

Second, and of equal importance, the Aviation Administration, the

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* The only case relied upon by MCA, New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435 (D. Mass. 1985), did not hold that there was an implied right of action under Section 2210. Although the reasoning of the case is not inconsistent with such a conclu-

[Footnote continues]

agency in charge of overseeing the statutory scheme at issue, is currently investigating the very claims raised by MCA in this Petition. Thus, it is simply not true, as MCA contends, that it is being deprived of an opportunity for adjudication of its rights (Pet., pp. 8-9). Rather, the Aviation Administration, which is now and always has been the proper forum to adjudicate MCA's contentions, will see to it that the federal legislation is enforced.

For all of the foregoing reasons, MCA fares no better under its Section 1983 claim which, for the first

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[Footnote continued]

sion, there is more recent authority in the same district which directly addresses the issue, and which holds, as have all other courts which have considered it, that there is no private right of action under Section 2210. See Interface Group, supra, 631 F.Supp. at 495-96.

time in MCA's Petition to this Court, is premised upon alleged violations of Section 2210 of the AAIA, not the FAA. Unfortunately for MCA, however, the Section 1983 claim was both pleaded (Compl., ¶ 54, Pet., p. 11a) and argued below on the theory that the Town Respondents had violated the FAA. Hence, neither court below ever addressed the issue of the availability of Section 1983 to redress an alleged violation of Section 2210 of the AAIA, and there are no exceptional circumstances warranting this Court to do so as a matter of first impression.*

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* MCA is absolutely wrong when it asserts that the courts below held MCA "could not sustain its cause of action for violations of § 2210 pursuant to 42 U.S.C. § 1983" (Pet., p. 9). In fact, the district court held

[Footnote continues]

Most importantly, under the well-established guidelines set forth by this Court, Section 1983 is not available to remedy an alleged violation of Section 2210, since MCA could not privately enforce that provision. Under the teaching of Middlesex and Pennhurst, Section 1983 is not available to redress an alleged violation of a statutory provision if either: (i) Congress did not intend in that provision to create enforceable

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[Footnote continued]

that MCA could not use Section 1983 to privately enforce Sections 1305 and 1349 of the FAA (Pet., pp. 19a-20a, 27a29a), the only law pursuant to which MCA sought Section 1983 relief. The court of appeals limited its decision to the FAA as well (Pet., p. 43a). Since MCA itself plainly concedes what is obvious -- the FAA and the AAIA are entirely different statutes (Pet., p. 11) -- MCA cannot now seriously argue that the issue which it raises in this Court was in any way pressed or decided below.

rights and obligations in favor of private parties; or (ii) the enforcement scheme of the underlying statute is sufficiently comprehensive so as to demonstrate a congressional intent to preclude the remedy of suits under Section 1983. As MCA concedes, the determination as to the availability of Section 1983 to redress an alleged deprivation of rights under Section 2210 entails the same analysis as the issue of whether there is a private right of action under that section (Pet., p. 10).

Employing the proper analysis, the result is clear. As numerous courts have held, there is no private right of action under Section 2210 because: (1) the section on its face makes clear that its purpose was to fund projects for the "public use", and not to ban discriminatory airport regulation; (2) The section

is structured as a directive to the Secretary of Transportation to receive "assurances" and, therefore, it was not designed to confer a right inhering in individual members of the benefitted class; (3) the legislative history of the provision does not indicate a Congressional intent to explicitly create a private right of action; (4) the AAIA, as a whole, was not intended to provide sanctions but is, instead, a comprehensive statutory system regulating the funding of airports; and (5) the aviation statutes comprise an intricate and comprehensive regulatory and enforcement scheme, which explicitly provides for private remedies only in certain cases, not including this one. See, e.g., Interface Group, supra, 631 F. Supp. at 495-96; Arrow Airways, supra, 749 F.2d at 490-91. Hence, there is simply no basis to conclude that Section 2210,

which may not be privately enforced in its own right, may be privately enforced through the vehicle of Section 1983.*

II. The Newly Raised Constitutional Issue

In Hallie, this Court reviewed its prior decisions concerning the scope of municipal immunity under the antitrust laws, and set forth clear guidelines for the lower courts in deciding such issues. In its Petition, MCA does not take issue

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* The Massachusetts district court decision in New York Airlines, Inc., supra, is the sole authority upon which MCA relies for the newly raised proposition that it may use Section 1983 to rectify an alleged wrong committed under Section 2210. The reasoning of New York Airlines, Inc., is expressly at odds with the same court's later decision in Interface Group, supra, and, we submit, simply cannot be squared with the well-settled line of authority, following Middlesex, which holds that Section 1983 cannot be used where the underlying statute, which was allegedly violated, creates no enforceable rights.

(as it did below) with the applicability of Hallie or the manner in which it was interpreted below.* Instead, MCA now claims that the court of appeals erred since "the New York Law is itself illegal because it runs afoul of the Supremacy Clause . . ." (Pet., p. 17).

This Court should decline to consider that issue for any one of a number of reasons. First, MCA did not raise this issue below, except as an afterthought on its Petition for Rehearing. Even there, MCA sought only "leave to amend its complaint to assert a claim under the Supremacy. . . clause." There

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* Indeed, MCA now seemingly agrees that New York's General Municipal law evinces a legislative intent to replace competition with regulation and, furthermore, that the statute contemplates the kind of "anticompetitive" conduct in which the Town engaged -- entering into particular lease arrangements (Pet., pp. 16-17).

is no reason for this Court to depart from the long-settled principle that it will not decide constitutional issues unless doing so is unavoidable. NAACP v. Alabama, 357 U.S. 449, 459 (1958).

Second, and more importantly, the court of appeals decision was in all respects correct. Under the Hallie test, New York State's explicit delegation of authority to municipalities to enter into exclusive and nonexclusive contracts easily satisfies the requirement of a "clearly articulated" state policy. The Second Circuit's decision was in accord with other courts which have applied that recently articulated test. See, e.g., Interface Group, supra, 631 F. Supp. at 488-90; Rural Electric Co. v. Cheyenne Light, Fuel & Power Co., 762 F.2d 847, 849-59 (10th Cir. 1985); Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d 607,

609-10 (5th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 231 (1985); Cine 42nd Street Theater Corp. v. The Netherlander Organization, Inc., 609 F. Supp. 113, 117-19 (S.D.N.Y. 1985), aff'd 1986-1 Trade Cas. (CCH), ¶67,097 (2d Cir. 1986).

Faced with this body of authority, MCA argues that the General Municipal Law is void on its face, urging that it is in conflict with Section 1305 of the FAA. MCA is wrong, however, because its proposed construction would render one part of Section 1305 -- subsection (b)(1) -- completely nugatory.

MCA's position seems to be that New York's General Municipal Law conflicts with Section 1305(a) of the FAA, which prohibits states and municipalities from enacting or enforcing laws or rules relating to "rates, routes, or services of any air carrier. . . ." What MCA has never come to grips with,

however, is the very next subsection of Section 1305, which excepts from the reach of subsection (a) the right of a "political subdivision as the owner or operator of an airport, . . . to exercise its proprietary powers and rights."

The Second Circuit harmonized the two subsections of Section 1305, and properly concluded that they were not inconsistent with each other. The Second Circuit then correctly held that the Town's actions constituted "valid exercises of the Town's proprietary rights granted under N. Y. Gen. Mun. Law § 352," and that "[t]he preemption statute, § 1305, reserves to the states and local government this power" (Pet., p. 41a). That decision was, we submit, both correct and in keeping with the long-standing rules of construction that statutes are to be construed so as to give effect to

all parts. See, e.g., National Insulation Transportation Committee v. I.C.C., 683 F.2d 533, 537 (D.C. Cir. 1982).*

Finally, we note that all the of these issues are under investigation by the Aviation Administration in its current proceeding. Thus, to the extent some legally cognizable right of MCA is being violated (and we think it is clear

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* In this regard, it is worth emphasizing that there is no dispute that MCA is operating as an air carrier at the Airport on a year-round basis, and the Town has acknowledged its right to do so (Pet., p. 4). Although MCA now strenuously argues that certain FBO services (such as fueling and tie-downs) are, somehow, necessary for MCA to operate as an air carrier (Pet., p. 4-5), it expressly told the court of appeals that this was not an issue in this case. See Petition for Rehearing, p. 8 ("Similarly, the Court's conclusion as to compelling the Town to lease to appellant necessary airline support services bears no relationship to the issues of the appeal . . ."). This is yet another example of MCA's shifting of gears to find some issue which it believes is worthy of this Court's attention.

that none is), MCA will obtain redress in the agency entrusted by Congress with enforcing the very rights MCA claims to have. Surely, there is no need for this Court to reach any constitutional issue in this case regarding such claims.

III. There Are No Reasons Justifying the Grant of MCA's Petition as to EHA.

There was no point for MCA to have included East Hampton Aire, Inc. and Frank LaVigna, the private non-governmental respondents, in its petition to this Court for a writ of certiorari. None of the arguments advanced by MCA for the issuance of a writ is directed against EHA, and even if resolved in favor of MCA, arguendo, would not implicate EHA in any way or involve them in further court proceedings below.

At any rate, there is no basis for the issuance of a writ as to EHA,

since it is clear that MCA's complaint against EHA is insufficient as a matter of law on at least two separate and independent grounds. Its claim is barred by the Local Government Antitrust Act of 1984, which expressly provides that the antitrust immunity accorded to local governments under the Act should also be extended to private parties. It is also barred by the state action doctrine as applied by this Court.

The Second Circuit, therefore, in unanimously affirming the district court correctly concluded that MCA's Clayton Act claim for damages against EHA is barred as a matter of law.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition must be denied.

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No. 85-2102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF

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IN THE

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No. 85-2102

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

In an effort to avoid the merits of this case, the Respondents in their Joint Brief in Opposition have misstated certain key facts and have suggested that the issues here for decision are not here at all. They are wrong in both respects.

THE FACTS

The Town states in its brief[1] that "MCA attempted to continue its FBO operations" at the airport but

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[1] Hereinafter, "Town Brief," at 5-6.

was prevented from doing so by the Town. This is only part of the truth. The Town prohibited MCA from even flying into the East Hampton Airport, much less providing FBO services. The Town did not concede MCA's right to fly into East Hampton until November 1985.[2] The Town is still attempting to prohibit MCA from providing ground support services as well as FBO services. These continuing efforts by the Town to prohibit these services constitute the heart of MCA's case, namely, that regulation of an air carrier by a municipality instead of deregulation compelled by federal law is improper and illegal.

Secondly, and more importantly, the Town straightfacedly suggests[3] two nearly anomalous positions. In one breath, the Town states that MCA should seek its relief in an administrative hearing conducted by the FAA, and, further, that the results of that investigation to date demonstrate that "the Aviation Administration did not find that the Town was discriminating against MCA."[4] Both statements beg credulity. First, taking them in reverse order, the FAA as a result of its informal investigation has specifically found that the Town has discriminated against MCA:

> We will be forced to conclude that the Town's refusal to grant Long Island Airlines [MCA] permission to operate on a year-round basis is in violation of its grant agreements and the Federal Aviation Act unless the Town

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[2] Curiously, this was the day before oral argument in this case before the Second Circuit.

[3] Town Brief at 14 and 15 in the text and footnote.

[4] Continuation of footnote at 15.

> articulates *nondiscriminatory* reasons for its refusal.[5] (emphasis added)

Less than six weeks later, the Regional Counsel again wrote to Mr. Stein and stated:

> We conclude from these facts that the Town's refusal for more than one year to grant MCA permission to operate year-round without substantive reasons, is tantamount to granting the present year-round FBO an exclusive right from October 1 through April 30 and indicates that *MCA is not being treated on fair and reasonable terms and without unjust discrimination.*[6] (emphasis added)

Contrary to the Town's assertions in its brief, the FAA *did* find discrimination on the part of the Town against MCA. Notwithstanding, the Town then suggests that the FAA investigation should be MCA's exclusive remedy, neglecting to state to this Court that the Town has consistently ignored the FAA's findings. It was only because the Town persistently refused to abide by the FAA mandates that it cease its discriminatory behavior against MCA that MCA was compelled to institute this litigation. Yet now the Town suggests that MCA should not be permitted to continue the litigation but instead seek its remedies through the FAA whose authority has been totally ignored by the Town. It is small wonder that the

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[5] FAA Regional Counsel letter of November 21, 1984 to Russell S. Stein, Town Attorney. Full text of letter contained at Appendix G in MCA Petition beginning at 49a.

[6] FAA letter of January 7, 1985 to Russell S. Stein. Full text of letter is contained at Appendix H of MCA Petition beginning at 51a.

Town does not want these issues resolved by the federal courts.

ALL ISSUES ARE PROPERLY BEFORE THIS COURT

The Town suggests that claims for relief pursuant to 49 U.S.C. § 2210 and the supremacy clause were not before the lower courts and thus cannot be heard here. This is incorrect for two reasons.

A. 49 U.S.C. § 2210

Paragraph 42 of MCA's Complaint specifically states that "the defendants violated the assurances required by 49 U.S.C. § 2210a . . . in unfairly discriminating against [MCA]. . . ."[7] The relief sought included a request for "a permanent injunction . . . prohibiting [the Respondents] from interfering with the year round operation of [MCA] as an air carrier and fixed base operator."[8]

Further, the United States District Court *held* that "a claim falling under § 2210(a) cannot withstand scrutiny. . . ."[9] The Second Circuit at the beginning of its opinion stated that MCA in its Complaint alleged violations of 2210(a).[10] Plainly § 2210(a) is a part of this case. It was pleaded in the lower court, decided by the lower court, and referred to by the Second Circuit in its opinion. Additionally, all reme-

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[7] MCA Petition at 9a.

[8] MCA Petition at 13a.

[9] September 4, 1985 decision of Eastern District, MCA Petition at 29a.

[10] MCA Petition at 32a-33a.

dies sought pursuant to 42 U.S.C. § 1983 are derivative of other federal laws. The 1983 claim before this Court is based upon rights derived from 42 U.S.C. § 2210(a). *See New York Airlines v. Dukes County*, 623 F. Supp. 1435 (D.C. Mass. 1985). In the § 1983 count of the Complaint, MCA explicitly referred to all of the activities described in the previous paragraphs of the Complaint, including the earlier reference to § 2210.[11]

B. Supremacy Clause

The Town also claims that the supremacy clause argument is newly asserted before this Court. This statement similarly is incorrect. The entire thrust of Count II of the Complaint stated MCA's position that § 1305 preempts state law.

> 38. 15 USC § 1305 provides for federal preemption and prohibits any state or political subdivision thereof from regulating rates, routes or services of any air carrier, thereby prohibiting the Town from denying equal access by [MCA] to the Airport.[12]

Further, that these claims are based upon the supremacy clause is demonstrated not merely in the fact that they were specifically referred to in the Petition for Rehearing filed in the Second Circuit,[13] but it is implicit in the Second Circuit's ruling that the N.Y. State laws—by virtue of § 1305(b)—preempt the pro-

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[11] MCA Petition at 11a.

[12] MCA Petition at 8a.

[13] Town Brief at 28.

visions of 49 U.S.C. § 1305(a).[14] The supremacy clause is and always has been an intrinsic element of this case.

Moreover, even if this Court were to find that despite the language of the Complaint and the findings of the lower courts that § 1983 and implied rights of action under § 2210 as well as preemption of state law by § 1305 were not raised and decided below, this Court has the authority and opportunity to decide those issues. The Town relies upon *McGoldrick v. Compagnie Generalie Transatlantique*, 309 U.S. 430 (1940) for the proposition that this Court "does not decide questions not raised or resolved in a lower court."[15] The *McGoldrick* decision, however, addressed only issues raised for the first time in this Court on appeal from a *state* supreme court. Importantly, that case, and its progeny, hold that when the case arises from a *federal* court then this Court will, under certain circumstances, consider issues not raised below.

For example, in *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court noted:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as

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[14] MCA Petition at 40a-41a.

[15] Town Brief at 20.

> where the proper resolution is beyond any doubt [citation omitted] or where "injustice might otherwise result" [citation omitted].

422 U.S. at 121. These two examples were expressly "not intended to be exclusive." 428 U.S. at 121, n. 8.

Importantly, in *Singleton*, Justice Blackmun discussed the reasons for this rule of appellate practice. He wrote that in cases in which evidence has been taken and the matter fully litigated, it is not just to permit a new issue to be raised on appeal without the opposing party having had an opportunity below to elicit evidence in his behalf. Here, of course, MCA was given no opportunity to present *any* evidence. The case was dismissed pursuant to a motion under FED.R.CIV.P. 12(b)6. Thus, since the underlying basis for the rule does not appear in this case, the rule itself should not apply. Moreover, in *Singleton*, this Court noted that the limitation on appellate review applied to issues "not passed on below." 428 U.S. at 120. Here, both the District Court and the Court of Appeals were presented with the issues which the Town now claims were not raised.

Finally, if this Court were to permit the decision of the Second Circuit to stand on the sole ground that the important federal issues squarely presented by the Petition for Writ of Certiorari were not raised below, there is little doubt that "injustice will result." This injustice will affect not only MCA, but as can be seen from the brief *amicus curiae* filed by the Regional Airline Association, the injustice will affect the entire airline industry as well as the passengers transported by that industry. Under these circum-

stances this Court should grant the writ of certiorari and decide these important federal issues.

THE PREEMPTION ISSUE IS OF OVERRIDING FEDERAL IMPORTANCE

Ordinarily, one reviewing the Petition for Writ of Certiorari might conclude that MCA and the *amicus* have overstated the danger and importance to the airline industry of the lower courts' decision that 49 U.S.C. § 1305(b) overrides 49 U.S.C. § 1305(a). The incorrectness of such a conclusion, however, could not be more dramatically confirmed than by the position taken by the Town in its Brief in Opposition.

The Town claims that the interpretation of § 1305(a) urged by the airline industry renders § 1305(b) "completely nugatory."[16] In fact, the airline industry urges that while under § 1305(b) a local authority may exercise some proprietary powers, it may not interfere with rates, routes and services as expressly proscribed by § 1305(a).[17] The fact that the decision of the Second Circuit lends support to the argument asserted by the Town indicates the tremendous impact that the ruling will have upon the industry across the country. Every local authority, relying upon the decision of the Second Circuit, will have the opportunity to act as a local Civil Aeronautics Board and effectively turn the congressional purpose embodied in deregulation squarely on its head. Beyond doubt, that was not the intention of Congress in adopting this legislation. If a court is to decide that Congress intended for there to be hundreds of independent bodies na-

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[16] Town Brief at 30.

[17] Regional Airline Association Brief *Amicus Curiae* at 9-13.

tionwide which can determine rates, routes and services for the airlines by calling their actions "proprietary," such a decision should come only from this Court.

CONCLUSION

For these reasons, and those urged in the Petition for a Writ of Certiorari, Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit in order that the decision of that court be reversed.

Respectfully submitted,

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Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

BRIEF FOR THE RESPONDENTS IN RESPONSE TO MOTION OF THE REGIONAL AIRLINE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as The Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Respondents.

BRIEF FOR THE RESPONDENTS IN RESPONSE TO MOTION OF THE REGIONAL AIRLINE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Respondents respectfully submit this brief in response to the motion of the Regional Airline Association ("RAA") for leave to file a brief amicus curiae in support of the petition for a writ of certiorari filed by Montauk-Caribbean Airways, Inc. ("MCA").

REASONS FOR DENYING THE MOTION

The Rules of this Court are clear: Where consent of the parties has been refused, a motion for leave to file a brief of an amicus curiae in support of a petition for a writ of certiorari is "not favored." See Rule 36.1 of the Rules of the Supreme Court of the United States. Here, consent has not been obtained, and the motion and brief filed by RAA are a perfect illustration of why that rule pertains.

Wholly foreign to, and ignorant of, the contractual dispute at issue in this case, RAA served its brief at a time which prevented respondents from addressing it in connection with their opposition to the petition. Further, in its brief, RAA urges this Court to grant a writ of certiorari for a whole host of reasons which were not raised by the petitioner and, more importantly, which

have nothing to do with the case actually before the Court. More specifically, by misstating the holding of the Second Circuit, RAA attempts to transform the instant contract dispute into an issue of national import. Because the Second Circuit's decision simply did not have the reach or effect ascribed to it by RAA, its motion for leave to file a brief amicus curiae should be denied.

I. RAA'S EXPRESSED CONCERNS ARE NOT PRESENT IN THIS CASE

According to RAA, this case merits review by the highest Court of the land because the effect of the Second Circuit's decision is to permit a municipality to exercise proprietary powers or rights "for the purposes of directly and materially affecting an air carrier's

rates, routes or services."* However, the Second Circuit did no such thing.

In fact, the Second Circuit's holding was narrowly tailored to meet only the issue actually raised before it -- "whether the Town of East Hampton was exercising its proprietary rights as owner of the Airport when it refused to modify the ten-year lease to which the parties agreed in 1979."** Insofar as the issue of federal preemption was concerned, the court held that, in light of the existing lease (to which MCA had voluntarily agreed), there was no

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* Regional Airline Association's Brief Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated August 8, 1986 ("RAA Brief", p. 11).

** Petition of Montauk-Caribbean Airways, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated June 25, 1986 ("MCA Pet."), p. 41a.

authority for the proposition that the Town of East Hampton was required to modify that lease so as to permit MCA to operate as an FBO year-round, or to rent MCA equipment and services to conduct year-round air service.

It is clear, we submit, that the scope and effect of that holding is a far cry from what RAA has imagined it to have been -- a "radical expansion of [a municipality's] proprietary powers and rights, crippling the free market basis of airline deregulation. . ." (RAA Brief, p. 2). Hence, review by writ of certiorari is unwarranted.*

In sum, although RAA would have this Court believe that the decision

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* The exceedingly narrow scope of the issues decided below constituted the reason why respondents declined to give RAA their consent to file its brief.

below will have deleterious effects of a national magnitude, in fact the holding, which is based upon a specific lease agreement between the Town and MCA, does not and could not allow the possibility of the kind of municipal overreaching feared by RAA.* Further, RAA's specific concern that the decision will, among other things, "conflict with the ability of the [Federal Aviation Administration] to administer the Federal aviation laws and detract from its ability to fulfill its role in air safety" is remarkable (RAA Brief, p. 7). To the contrary, the decision below, by denying a private right of action under the Federal Aviation Act, leaves the Federal Aviation

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* Indeed, as petitioner and RAA are forced to concede, MCA is currently operating air carrier service in and out of the East Hampton Airport (MCA Pet., p. 4; RAA Brief, p. 5).

Administration, the agency entrusted by Congress with the responsibility for enforcing those laws, free to exercise its statutory mandate without conflicting decisions arising out of disputes between parties unconcerned with the national welfare.*

II. RAA HAS RAISED NO ISSUE WORTHY OF REVIEW

In support of its contention that this case is worthy of review, RAA repeats several reasons advanced by MCA, adds several new ones which MCA never raised, and conjures up a conflict "in principle" in the Circuits. None of

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* In fact, the Federal Aviation Administration is currently taking an active role in investigating the very dispute at issue herein. Thus, just as the federal aviation laws contemplate, the Federal Aviation Administration is, and should be, the proper forum for MCA's complaint.

these reasons is sufficient to warrant review.

Insofar as RAA merely repeats arguments advanced by MCA, they should be rejected for reasons set forth in the Respondents' Brief in Opposition to MCA's Petition. To the extent RAA has purported to assert several new reasons for review, each one was expressly disclaimed or disavowed by the petitioner, MCA, in either the lower courts or in this Court.*

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* Thus, for example, although RAA urges review of whether the Town violated the Federal Aviation Act, 49 U.S.C. § 1349(a) (RAA Brief, pp. 13-17), MCA has conceded to this Court that there is no private right of action under that provision (MCA Pet., p. 14). Similarly (as set forth more fully in the Respondents' Brief in Opposition), while MCA disclaimed below any reliance upon the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2210, RAA seeks review of that issue (RAA Brief, pp. 13-15).

Review of any such issue is unwarranted and inappropriate.

Finally, RAA has created out of whole cloth a "conflict in principle" in the Circuits which, we submit, is a euphemism for no conflict at all.* In fact, the Second Circuit's decision was limited exclusively to the unavailability of a private right of action under 49 U.S.C. § 1349(a). Not one case cited by RAA holds, under the controlling legal principles, that there is a private

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* RAA is not helped by its disingenuous restatement of the Second Circuit's holding. Although the Second Circuit held, simply, that there is no private right of action under Section 1349(a) (MCA Pet., pp. 41a-43a), RAA seeks to create the impression that, instead, the court reached the merits of MCA's claim and held that there was no discrimination at the Airport (RAA Brief, p. 15). This sleight of hand does not change the fact that none of the cases cited by RAA are in conflict with the Second Circuit's decision.

right of action under that provision.* Hence, there is not, and cannot be, a "conflict" of the kind postulated by RAA.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that

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* At issue in City of Pompano Beach v. F.A.A., 774 F.2d 1529 (11th Cir. 1985), was judicial review of a determination made by the Federal Aviation Administration, not a private right of action brought ab initio in federal court. The case of Niswonger v. American Aviation, Inc., 411 F. Supp. 769 (E.D. Tenn), aff'd without op., 529 F.2d 526 (6th Cir. 1975), is unpersuasive since it was decided before Cort v. Ash, 422 U.S. 66 (1975), although affirmed without opinion thereafter. Since Cort established the controlling principles for implying private rights of action, Niswonger is no longer good law, as at least two courts have squarely held. See Hill Aircraft & Leasing Corp. v. Fulton County, Ga., 561 F.Supp. 667, 673-74 (N.D. Ga. 1982), aff'd without op., 729 F.2d 1467 (11th Cir. 1984); Guthrie v. Genesee County, 494 F.Supp. 950, 960 (W.D.N.Y. 1980). Since the Second Circuit did not purport to address any provision other than 49 U.S.C. §1349(a) (because none had been raised by MCA), the remaining cases cited by RAA are wholly inapposite.

RAA's motion should be denied. Neither review by writ of certiorari nor remand is warranted or appropriate.

Respectfully submitted,

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MOTION FILED
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No. 85-2102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,
Petitioner,

v.

JUDITH HOPE, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE REGIONAL AIRLINE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MONTAUK-CARIBBEAN AIRWAYS, INC.,
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Petitioner,

v.

JUDITH HOPE, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Regional Airline Association ("the RAA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of petitioner has been obtained and filed with the Court. The consent of the several respondents was requested but refused.

The RAA is the trade association of the regional/commuter air carrier industry. The RAA represents a substantial segment of that industry, and the regional/commuter carriers are a substantial part of the national air transportation system. Regional/commuter air carriers are carriers which operate primarily with aircraft of 60 seats or fewer or 18,000 pounds payload or less. The RAA has 76 air carrier members whose operations constitute substantially more than 50 percent of the revenue passenger miles operated by this class of carrier in 1985. In 1985, the regional/commuter carrier industry

served 854 airports in the United States and carried over 27.3 million passengers. Petitioner is an air carrier member of the RAA.[1]

The RAA's air carrier members have a substantial interest in the decision rendered by the Second Circuit, specifically the issues of Federal preemption and private actions with respect to the Federal aviation laws, the underlying interstate commerce and Federal supremacy constitutional issues, and whether violations of the Federal aviation laws are cognizable under 42 U.S.C. § 1983 (1982 and Supp. 1984). Those issues are immediately relevant to the disposition of this case.

The Second Circuit's decision, when viewed in its proper and complete context, touches upon the core relationship among air carriers, airports and the Federal Government in the operation and management of the national air transportation system. The decision would significantly expand the scope of airport operators' proprietary powers and rights that are not preempted by Federal law, to the detriment of a sound national air transportation system and the Federal Government's administration of the airways. In short, the decision permits airports, by virtue of their proprietary powers, to maintain exclusive use rights for airport facilities, to discriminate unjustly among air carriers and to regulate the rates, routes and services of air carriers. The adverse effects of those developments on the RAA's members, and the national air transportation system, are apparent. Furthermore, the Court of Appeals decision limits the ability of air carriers to seek relief in Federal court from an airport's violations of Federal statutory requirements. The regional/commuter airlines have a clear and vital interest in each of these important Federal matters.

The RAA has consistently advocated fair and nondiscriminatory access for all air carriers to airports and

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[1] The RAA was not a party to this action in the lower courts.

airport facilities, and it has been a strong proponent of Federal supervision of airport access restrictions, consistent with airport operators' proprietary powers and rights and the interests of communities surrounding airports.

The RAA's members have an obvious interest in maintaining fair and non-discriminatory access to airports. As air carriers, they have a vital stake in the free flow of interstate commerce and the national air transportation policy that air carriers, in response to market forces, determine rates, routes and services unfettered by local regulation. Interstate air commerce will be severely burdened, and the national air transportation policy frustrated, unless all air carriers have non-discriminatory access to airports and airport facilities and the Federal prohibitions against exclusive use rights and unjust discrimination are applied in a uniform manner at airports throughout the Nation.

As the representative of a major segment of the air carrier industry, the RAA would bring to this proceeding an interest broader than that represented by the parties. Additionally, the RAA has greater familiarity with the national significance of the Second Circuit's decision and how it will impact upon the air carrier industry and the national air transportation system. Finally, the RAA has a substantial background in Federal aviation law and airport access restriction matters. The RAA has represented its members before the United States Department of Transportation and its constituent agency, the Federal Aviation Administration, as well as participated in Federal court litigation concerning preemption under the Federal aviation laws, discriminatory treatment of air carriers and airport access restrictions, precisely the matters raised here.[2]

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[2] The RAA has propounded two additional Questions Presented so that the issues pertinent to the administartion of the Federal aviation laws might be raised directly. The RAA's Questions

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Presented, which are fairly encompassed in Questions Nos. 1 and 3 propounded by petitioner, are raised in addition to petitioner's questions.

QUESTIONS PRESENTED

Petitioner alleges that the Town of East Hampton, New York, acting under color of state statute, refuses to terminate exclusive lease arrangements with an air carrier at its municipally-owned, federally-funded airport, thereby discriminating against petitioner's air carrier services, precluding petitioner from providing passenger and aircraft support necessary for successful air carrier operations at the airport, and placing petitioner's services at a competitive disadvantage. The Court of Appeals held, in part, that the Town's refusal to end the exclusive lease arrangements is a valid exercise of its proprietary powers and rights under the state statute and is not preempted by federal law.

1. Are proprietary powers and rights recognized under Section 105(b)(1) of the Federal Aviation Act preempted by Section 105(a)(1) of that Act if those powers and rights are exercised in a manner which relates to, or affects, the rates, routes or services of an air carrier?

2. May the Town's refusal to terminate its exclusive lease arrangements be recognized under Section 105(b)(1) of the Federal Aviation Act as a lawful exercise of proprietary powers or rights, and may New York law authorize such exclusive lease arrangements at a federally-funded airport, when Section 308(a) of the Federal Aviation Act, and Section 511(a) of the Airport and Airway Improvement Act of 1982, bar exclusive use rights and unjust discrimination against air carriers at any federally-funded airport?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2102

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d/b/a LONG ISLAND AIRLINES,
Petitioner,

v.

JUDITH HOPE, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE REGIONAL AIRLINE ASSOCIATION

The Regional Airline Association ("the RAA") respectfully submits this brief *amicus curiae* in support of petitioner's request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-titled proceeding on February 14, 1986.

INTEREST OF THE *AMICUS CURIAE*

As discussed in the foregoing motion for leave to file this brief, the RAA is the trade association of the regional/commuter air carrier industry. That the RAA's members could be adversely affected by the Court of Appeals decision is apparent. That decision holds, in part, that a municipally-owned airport may, pursuant to state statute, refuse to terminate exclusive lease arrangements that discriminate against an airline and deny that airline access to support necessary for its air carrier operations, notwithstanding Federal law directly to the contrary. Second, the decision holds that such conduct is not preempted by Federal law even though it may directly relate to the rates, routes or services of air carriers, an area

specifically preempted by Federal aviation law. Third, the decision precludes private actions by air carriers seeking relief from such conduct under the Federal aviation and civil rights laws. Such holdings impact upon the vital interests of all air carriers.

The effects of the decision will be felt immediately in the Second Circuit, which includes major municipally-owned airports, as those airports use their vastly expanded proprietor rights to control the rates, routes or services of carriers and to grant preferred carriers exclusive use rights to airports and airport facilities. Undoubtedly, the decision will soon be relied upon by municipally-owned airports throughout the Nation as authority for a radical expansion of their proprietary powers and rights, crippling the free market basis of airline deregulation and the ability of the Federal Government to maintain access to the airways. At the same time, the decision precludes private actions, so that Federal court relief from improper airport conduct would be unavailable to carriers at the time of greatest need. Accordingly, the Second Circuit's decision is directly inimical to the interests of the RAA's air carrier members and the traveling public.[1]

STATEMENT OF THE CASE

Petitioner Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines ("MCA"), seeks a writ of certiorari with respect to a decision of the United States Court of Appeals for the Second Circuit. That decision affirmed a dismissal by the United States District Court for the Eastern District of New York, pursuant to Fed. R. Civ. P. 12(b)(6), of petitioner's Complaint which alleged that it had been denied access to East Hampton Airport, New York ("the Airport"), in violation of the Federal avia-

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[1] The RAA's interest is limited to the Federal aviation issues discussed above. It does not present any view with respect to the merits of the contract dispute between the parties, and does not address the antitrust issues except as they relate to the Federal aviation issues.

tion, antitrust and civil rights laws.[2] The Court of Appeals decision is reported at 784 F.2d 91 (2nd Cir. 1986), and is provided at Appendix D of petitioner's brief.

MCA is an air carrier that has served the Airport since the 1960s. The Airport is owned and operated by the Town of East Hampton, New York ("the Town"). East Hampton Aire, Inc. ("EHA") is the only other air carrier serving the Airport.

In addition to its air carrier services, MCA is also a fixed base operator ("FBO") at the Airport. An FBO, analagous to an automobile service station, provides fuel, oil, maintenance, aircraft parking and tiedowns and similar aircraft-related services to the aircraft operating public.[3] An air carrier can, of course, fuel and service its own aircraft at an airport, or purchase fuel and aircraft-related services from an FBO.[4]

It should also be appreciated that an air carrier's services include not only flight operations (*i.e.*, landings and take-offs), but also passenger-related services at the terminal, such as ticketing, passenger and baggage handling, and providing counter space.[5] At most airports, the passenger-related services are operated completely separate from the FBO operations. For obvious competitive reasons, most air carriers insist on the right to provide their own passenger-related services at the terminal.[6]

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[2] Because the trial court granted respondents' motion to dismiss, the record concerning petitioner's allegations was not developed. Accordingly, the RAA's statements concerning the facts of this case are necessarily based on the Complaint, and any reasonable inferences therefrom, or factual statements by petitioner in its brief that are supported by the lower courts' opinions.

[3] *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543, 548 n.1 (M.D.N.C. 1979).

[4] Section 511(a)(1)(C) of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671 ("the AAIA"), 49 U.S.C. App. § 2210(a)(1)(C) (1982 and Supp. 1984).

[5] *Airline Deregulation and Airport Regulation*, 93 Yale L.J. 319, 325 n.44 (1983) ("*Airline Deregulation*").

[6] *See id.* at 332-34.

Those services are usually provided in terminal space leased from the airport or subleased from other carriers.[7]

MCA operated a year-round FBO at the airport until 1979, when it reached a new FBO agreement with the Town, for a 10-year term that ends in 1989.[8] That agreement required MCA to provide FBO services at the Airport only during the period May through September of each year, which represents the five summer months that constitute the high summer season at the Town. From 1980 through 1982, MCA, apparently of its own volition, limited its regular air carrier services to the Airport to the five summer months.

In 1983, MCA sought to continue its air carrier services (including its passenger-related services and servicing its own aircraft) and FBO operations after the end of the five-month summer season. The Town refused and even prohibited MCA from conducting passenger flight operations (*i.e.*, landings and take-offs) at the Airport during the seven-month off-season.[9] In short, the Town refused to acknowledge MCA's claimed right to conduct year-round air carrier and FBO operations, and refused to extend or amend MCA's five-month lease, despite the fact that EHA, the other air carrier serving the Airport, had a year-round lease permitting it to provide such services. Essentially the same developments occurred at the end of the 1984 summer season.

In February 1985, MCA brought suit in the Eastern District against respondents because MCA had not been permitted to serve the airport during the 1984-85 off-season. Because of the ongoing litigation, at the end of the 1985 summer reason the parties stipulated that MCA

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[7] *See Airport Access Task Force, Report and Recommendations of the Airport Access Task Force* 50 (presented to Congress on March 10, 1982) (study conducted pursuant to Section 527 of the AAIA, 49 U.S.C. App. § 2226).

[8] Petitioner's brief at 3a-4a (Appendix A, para. 14).

[9] Petitioner's brief at 4a-5a (Appendix A, paras. 16, 20 and 23); *see* petitioner's brief at 4.

could continue its air carrier operations and service its own aircraft until mid-November, although MCA's FBO operations for other carriers was not permitted. In November 1985, the Town refused to renew the stipulation, and MCA obtained an injunction from the Second Circuit barring the Town from terminating MCA's activities at the Airport. That injunction was lifted by the Second Circuit, however, on February 14, 1986, thus permitting the Town to terminate MCA's off-season services at the Airport.[10]

Armed with the Second Circuit's decision, the Town intends to return to its prior practice and prohibit MCA from handling its own ticketing, passenger and baggage handling, counter space and similar passenger-related services at the Airport at the conclusion of the summer season.[11] By contrast, EHA is permitted to handle such services for itself and other air carriers, and MCA would be required to rely upon EHA, its sole air carrier competitor at the Airport, for those passenger services.[12] Furthermore, the Town intends to prohibit MCA from providing its own fuel, maintenance and similar aircraft-related services for its aircraft during the off-season; similarly, MCA would not be permitted to provide FBO services to others during the off-season.[13] Again, by contrast, EHA is permitted to operate its FBO year-round and MCA would be required to rely upon EHA's FBO

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[10] In November 1985, the Town conceded that MCA could conduct air carrier flight landings and take-offs at the Airport during the off-season, but has not conceded that it may do any more than that during the off-season.

[11] Petitioner's brief at 4-5. During the current summer season, MCA may operate pursuant to its 10-year lease. At the end of the summer season, however, the Town has indicated that it will again prohibit MCA's activity at the airport (except landings and take-offs).

[12] *Id.*

[13] *Id.*

for fuel and aircraft-related services during the off-season.[14]

The core of the instant dispute, then, is the Town's refusal to acknowledge or extend MCA's lease so that it can provide its own passenger and aircraft-related services at the Airport year-round. Because the Town permits EHA to operate similar passenger and aircraft-related services year-round for itself and other air carriers, MCA alleges that the Town has granted EHA exclusive lease or use arrangements during the off-season, has discriminated and will again discriminate against MCA, and has regulated and will regulate MCA's rates, routes or services by preventing it from handling its own passenger services, by preventing it from servicing its own aircraft and by competitively disadvantaging MCA's operations with the requirement to use a competitor's FBO services. Significantly, the Federal Aviation Administration ("the FAA") has issued a preliminary order finding the Town's conduct to be in violation of Federal law.[15]

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Raises Important Federal Matters, Conflicts In Principle With Other Circuits and Will Have a Major Adverse Impact on the National Air Transportation System.

This case presents important and recurring Federal questions of the extent to which the proprietary powers and rights of municipally-owned airports are preempted by the Federal aviation laws.[16] Presented also is the im-

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[14] *Id.*

[15] Petitioner's brief at 53a (Appendix H).

[16] For example, the issue of Federal preemption of state law in the context of Federal aviation law and international air transportation was recently addressed by the Court in *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 54 U.S.L.W. 4687 (U.S. decided June 18, 1986), in which this Court held that a Florida tax on aviation fuel sold to foreign air carriers is not preempted by the Federal

portant Federal matter of whether an air carrier may bring an action under 42 U.S.C. § 1983, or under the Federal aviation laws, for violations of the Federal aviation laws by municipally-owned airports.

The holdings of the Second Circuit in this case that municipally-owned airports, in the exercise of their proprietary powers and rights pursuant to state statute, may (1) enter exclusive lease arrangements for the use of federally-funded airports, (2) discriminate against certain air carriers in the providing of facilities and services, and (3) prevent carriers from providing passenger services and from servicing their own aircraft, thereby regulating rates, routes or services of air carriers, are contrary to the Federal aviation statutes and conflict in principle with the position of three courts of appeals and well-established principles of Federal aviation law. Additionally, the Court of Appeals holdings that violations of the Federal aviation laws by a municipality are not cognizable under 42 U.S.C. § 1983, and that the Airport and Airway Improvement Act of 1982 does not permit a private action, are in error.

If permitted to stand, the decision will have a serious deleterious effect on the national air transportation system, conflict with the ability of the FAA to administer the Federal aviation laws and detract from its ability to fulfill its role in air safety, and deny air carriers a vital opportunity to redress violations of the Federal aviation laws.[17] The issues in this case are clearly of national scope and importance. Moreover, because of the interstate nature of air carrier service, there is a pressing need for a uniform Federal judicial position on these issues. Resolution of these matters assumes increasing importance in light of the virtual explosion of attempts

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Aviation Act and does not violate the Commerce Clause, U.S. Const., art. I, § 8, cl. 3. *See also infra* nn.35, 36.

[17] *Infra* 19-20; *see City of Dallas v. Southwest Airlines Co., infra*, 15, 371 F. Supp. at 1033 n.12; *Airline Deregulation, supra* n.5, at 322, 332-33.

by airports to use their proprietary powers to restrict access as demonstrated by the FAA's current proceeding to develop a national policy on airport access restrictions.[18]

II. The Town's Conduct, and the New York Statute Upon Which It Relies, Are Preempted by Federal Law.

A. *Introduction.*

The Second Circuit sustained the Eastern District's dismissal of MCA's antitrust claims on the grounds that the Town's conduct was immunized from antitrust liability by the state action doctrine, most recently articulated in *Town of Hallie v. City of Eau Claire*, —— U.S. ——, 105 S. Ct. 1713 (1985). An essential requirement of that doctrine is that the municipality establish that its anticompetitive conduct is authorized by state policy, and that the state legislature intended the anticompetitive consequences of that policy. *Hallie*, 105 S. Ct. at 1716, 1719.

In that regard, the Second Circuit examined N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 and Supp. 1984-85), which authorize a local government to own and operate an airport. Section 352 of that law provides in pertinent part that the local government operating the airport may:

> 5. Lease, or sublease the real property or lease, contract or otherwise agree, on an *exclusive* or nonexclusive basis, for the entire operation of such airport or landing field, or a part thereof, or for the rendering of various services or conduct of business activities, on or at said airport or landing field. (Emphasis added).

The Second Circuit found that Section 352:

> [D]eclares a state policy that municipal airport operators may enter into exclusive lease arrangements. This effectively replaces competition with regulation. We therefore must assume that the New

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[18] 51 Fed. Reg. 2985 (January 22, 1986); *see Airline Deregulation, supra* n.5, at 326-34, 338 n.113.

> York legislature contemplated the kind of anticompetitive activity in which the Town of East Hampton has engaged.[19]

Based on that finding the Court of Appeals held that the state action test of *Hallie* had been met and affirmed the dismissal of the antitrust claims.[20]

Irrespective of whether MCA stated an antitrust claim, the Second Circuit's holding that Federal law does not preempt the Town's conduct, or the New York statute, seriously errs. The New York law, and the Town's use of it, directly conflict with Section 105(a)(1) of the Federal Aviation Act of 1958, as amended ("the Federal Aviation Act"), 49 U.S.C. § 1305(a)(1). Moreover, Section 308(a) of the Act, 49 U.S.C. § 1349(a), and Section 511(a) of the AAIA, 49 U.S.C. App. § 2210(a), expressly bar certain aspects of the Town's conduct and preempt the New York law.

B. *Preemption Under Section 105(a)(1) of the Federal Aviation Act.*

MCA raised the preemption issue by arguing that Section 352 of the New York law had been preempted by Section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1); however, the Second Circuit rejected that position, concluding that the Town's exclusive lease arrangements with EHA were a valid exercise of the Town's proprietary rights that are excepted from preemption by Section 105(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1).[21]

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[19] Petitioner's brief at 39a-40a (Appendix D); 784 F.2d at 96. Significantly, Section 352 was enacted in 1948, well before enactment of the Federal Aviation Act in 1958, or the AAIA in 1982. Thus, in enacting Section 352 the New York legislature could not have contemplated the limitations imposed by the subsequent Federal aviation laws.

[20] *Id.* at 41a; 784 F.2d at 96.

[21] Petitioner's brief at 40a-41a (Appendix D); 784 F.2d at 97.

The Second Circuit's holding clearly errs as it fails to recognize that Section 105(a)(1) precludes a state or local government from enacting or enforcing:

> any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide air transportation.

MCA's allegations fall within the ambit of Section 105 (a)(1) as the Town previously precluded MCA's services during the off-season and will do so again at the end of this summer season (with the apparent exception of landings and take-offs). Thus, the Town's conduct violates Section 105(a)(1) because its refusal to end its off-season exclusive lease arrangements with EHA, and its refusal to permit MCA to service its own passengers and aircraft year-round, have the direct effect of relating to or regulating MCA's rates, routes or services as those actions (1) are designed to place MCA's services at a competitive disadvantage during th seven-month off-season thereby favoring the rates, routes and services of other carriers, (2) deny it access to airport facilities and prevent it from providing passenger services that are necessary for it to serve the Airport, and (3) implicitly, raise MCA's rates through discrimination against it.[22] MCA states that the Town has never advanced any basis for its efforts to exclude MCA, and it cites the preferential airport arrangements that EHA has enjoyed as evidence that the Town's actions against MCA are designed to benefit EHA.[23]

Assuming MCA's allegations to be true, the use of proprietary powers to achieve such goals is precluded by the express terms of Section 105(a)(1). Yet, it is apparently the view of the Second Circuit that a proprietary power or right recognized under Section 105(b)(1)

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[22] Petitioner's brief at 5, 19-20.

[23] Petitioner's brief at 19-20.

of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1), is not preempted by Section 105(a)(1), even though the proprietary power or right is exercised for the purposes of directly and materially affecting an air carrier's rates, routes or services.[24] The result of that reasoning is that Section 105(b)(1) overrides Section 105(a)(1), thereby permitting airports throughout the Second Circuit to influence, if not regulate, air carrier rates, routes or services under the rationale that the airport is only exercising its proprietary right to lease or contract. For example, under the authority of the Second Circuit's decision, airports could condition leases on a carrier's agreement to serve, or not serve, certain routes, or to limit the number of flights or the services provided to passengers.

The Second Circuit's position is erroneous. Nothing in the legislative history of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978), of which Section 105 was part, suggests that Section 105(b)(1) should prevail over Section 105(a)(1). Such a reading violates basic principles of statutory construction, as it results in Congress taking away by Section 105(b)(1), preemption that it expressly provided for in Section 105(a)(1), thus impliedly repealing Section 105(a)(1). Indeed, such an outcome would be contrary to the entire purpose of the Airline Deregulation Act of 1978, which was intended to permit the market place,

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[24] The Town's direct attempt to affect MCA's rates, routes or services is one of several factors distinguishing this case from *Wardair Canada, Inc. v. Florida Dep't of Revenue, supra* n.16. The aviation fuel tax in *Wardair*, permissible under Section 1113(b) of the Federal Aviation Act, 49 U.S.C. § 1513(b), was clearly not a tax on the items enumerated in Section 1113(a), 49 U.S.C. § 1513(a), that are preempted from state taxation. By contrast, in this case the Town is alleged to have used its proprietary powers recognized under Section 105(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1), to accomplish a goal that is specifically preempted in Section 105(a)(1) of that Act, 49 U.S.C. § 1305(a)(1).

not the Federal or local governments, to determine which and how many air carriers should serve a given airport, over what routes and at what fares.[25]

In short, whatever "proprietary powers and rights" may mean, they clearly do not include any power relating to the rates, routes or services of air carriers.[26] Such local regulation is no less onerous or unlawful because it comes in the subtle form of proprietary rights, rather than in the form of direct regulation.[27] Accordingly, as the Town's proprietary powers and rights are limited by Section 105(a)(1), to the extent their exercise conflicts directly with Federal law, they are unlawful under the Supremacy Clause, U.S. Const., art. VI, cl. 2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, *reh'g denied*, 431 U.S. 925 (1977).

If the Second Circuit's broad interpretation of proprietary rights under Section 105(b)(1) is permitted to stand, there can be little doubt that it will be readily seized upon as authority for a radical expansion of airport proprietary powers and rights. Local airports, many already under pressure by surrounding communi-

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[25] H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. 56 (1978).

[26] 14 C.F.R. § 399.110(d) (1986) (Civil Aeronautics Board ("the CAB") (now Department of Transportation) general policy statement providing that state actions governing flight frequency and mode of operations are preempted); § 399.110(e) (proprietary powers must be exercised as to be nondiscriminatory, nonburdensome to interstate commerce, and designed to further legitimate state goals that do not conflict with federal law). In PS-83, 44 Fed. Reg. 9948 (February 15, 1979), promulgating 14 C.F.R. § 399.110, the CAB noted that states may not interfere with carrier decisions concerning prices and markets, and that Section 105 of the Federal Aviation Act is designed to prevent states from frustrating the benefits of federal deregulation. *Id.* at pp. 9949, 9951.

[27] *See Hingson v. Pacific Southwest Airlines, Inc.*, 743 F.2d 1408 (9th Cir. 1984) (Section 105(a)(1) preempts local laws *relating to* air carrier rates, routes or services, not just local laws *conflicting with* Federal law; therefore, California handicapped access rules are not applicable to interstate air carrier).

ties to reduce air carrier operations, could hardly resist such an expansion. Moreover, as the Court of Appeals decision substantially increases an airport's bargaining power in lease negotiations, airport operators will have a financial interest in expanding their proprietary powers. The national air transportation system will ultimately be severely affected. Economic air carrier scheduling would become virtually impossible as local concerns, not the market, would dictate service. Moreover, the FAA's very ability to manage the airways would be threatened by the innumerable local regulations and operating conditions with which it would have to deal.

C. *Preemption Under Section 308(a) of the Federal Aviation Act and Section 511(a) of the AAIA.*

The Town's conduct at issue here, and the New York statute, are further preempted and invalidated by Section 308(a) of the Federal Aviation Act, 49 U.S.C. § 1349(a), which expressly prohibits exclusive use rights at any federally-funded airport:

> There shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended.[28]

Additionally, Section 511(a)(2) of the AAIA, 49 U.S.C. App. § 2210(a)(2), provides that all Federal grants to airports shall include a requirement that:

> [T]here shall be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.[29]

That proprietary powers and rights recognized under Section 105(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1), are subject to these provisions is apparent

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[28] The Airport receives Federal funds. Petitioner's brief at 3a (Exhibit A, para. 10).

[29] The Airport is specifically bound to meet the requirements of Section 511(a) by Assurance 20 of its Grant Agreement, dated September 29, 1983. *Id.*; petitioner's brief at 50a (Appendix G); *see* 14 C.F.R. Pt. 152, Appendix D, paras. II.A.19 and 20 (with reference to predecessor of AAIA).

from Section 105(b)(1)'s legislative history. Senator Cannon, the Senate floor manager of the Airline Deregulation Act of 1978, of which Section 105 was a part, stated concerning Section 105:

> It was not the intent of the Senate conferees to limit in anyway the normal exercise of the existing proprietors' powers to place *nondiscriminatory* restrictions on the operations of an airport, *subject to constitutional and statutory limitations.* (Emphasis added).[30]

Accordingly, Section 352, and the conduct it authorizes, are facially preempted by federal law and are invalid. *Gibbons v. Ogden; Jones v. Rath Packing Co.*[31]

Even if Section 352 of the New York law and the Town's conduct were not facially preempted, it is clear that the Town is required to comply with Section 511(a) of the AAIA, 49 U.S.C. App. § 2210(a), by virtue of its acceptance of Federal funds for its airport.[32] It has therefore waived any claim to proprietary powers or rights that would violate Section 511(a).[33]

MCA's allegations against the Town, if proven, represent significant violations of the Federal statute and corresponding grant assurances. For example, prohibiting MCA from providing its own passenger-related services and from servicing its own aircraft during the seven-month off-season, while permitting EHA to perform those services for itself and other air carriers, patently violates

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[30] 124 Cong. Rec. 37419 (1978).

[31] The issue of preemption under Sections 308(a) and 511(a) was implicitly addressed by the Second Circuit as it concluded that no authority bars the Town's conduct here at issue, and that conclusion was necessary to its finding that Section 105(a)(1) did not preempt the Town's conduct and the New York statute. Petitioner's brief at 41a (Appendix D); 784 F.2d at 97.

[32] *United States v. Westchester County, infra* n.35, 571 F. Supp. at 798.

[33] *United States v. State of New York, infra* n.35, 552 F. Supp. at 265.

the equal access and non-discrimination requirements of Section 511(a)(1)(A).

More important, the Town's previous and impending refusals to permit MCA to service its own aircraft directly contravenes Section 511(a)(1)(C) of the AAIA, 49 U.S.C. App. § 511(a)(1)(C), which states that "each air carrier using such airport shall have the right to service itself. . . ." Significantly, the Section 511(a)(1)(C) right of an air carrier to service its own aircraft is guaranteed irrespective of whether MCA is being subjected to discrimination by the Airport; that right exists even if there were no other air carriers serving the Airport. Accordingly, MCA's rights under Section 511(a)(1)(C) have been violated in this case even without consideration of the preferences granted to EHA.[24]

D. *The Decision Conflicts In Principle With Other Circuits and Well-Established Legal Principles.*

The Second Circuit's decision, to the extent that it holds that the Town's conduct does not violate Section 308(a) of the Federal Aviation Act, 49 U.S.C. § 1349(a), conflicts in principle with the decision of the Eleventh Circuit in *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985) (affirming FAA order that exclusive FBO leases violate Section 308(a)), and a decision affirmed by the Sixth Circuit, *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 769 (E.D. Tenn.), *aff'd without op.*, 529 F.2d 526 (6th Cir. 1975) (exclusive FBO lease violates Section 308(a)). The decision in this case also conflicts, with respect to Section 511(a) of the AAIA, 49 U.S.C. App. § 2210(a), with a decision affirmed by the Fifth Circuit, *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974), *reh'g denied*, 420 U.S. 913 (1975) (city's requirement

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[24] Prohibiting MCA from operating an FBO during the seven-month off-season also violates Section 511(a)(2) of the AAIA, which prohibits exclusive FBOs, absent special circumstances that have not been demonstrated so far in this case.

that intrastate airline move to new terminal, while permitting air taxis to remain at old terminal, constitutes unjust discrimination in violation of 49 U.S.C. App. § 1718(a) (repealed by the AAIA), the predecessor of Section 511(a)). *See also New York Airlines, Inc. v. Dukes County*, 623 F. Supp. 1435 (D. Mass. 1985).

The Second Circuit's expansive view that an airport operator's proprietor powers and rights may be exercised unfettered by the requirements of the Federal aviation laws further conflicts with well-established legal principles, often recognized by the Second Circuit in the context of airport noise regulation, that airport proprietor rights must be exercised reasonably, in a nondiscriminatory manner, and with due regard for Federal administration of the airways.[35] Indeed, even those decisions that have sustained a proprietor imposed noise restriction, relying on the possibility of a "proprietor exception" to Federal preemption alluded to in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973), have done so only after the airport demonstrated that the local regulation was reasonable, nondiscriminatory and

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[35] *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977) (noise regulation must be reasonable, nonarbitrary and nondiscriminatory and limited to establishing noise levels for the airport and immediate environs, relying on Supremacy and Commerce Clauses and predecessor of Section 511, AAIA); *British Airways Board v. Port Authority of New York*, 564 F.2d 1002 (2d Cir. 1977) (proprietor's regulation of airport noise held invalid because not "reasonable, non-arbitrary and nondiscriminatory"); *United States v. Westchester County*, 571 F. Supp. 786 (S.D.N.Y. 1983) (curfew imposed by proprietor violates Commerce Clause, is preempted and is unreasonable and arbitrary); *United States v. State of New York*, 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (curfew imposed by proprietor violates Supremacy Clause because it is (1) preempted by Federal law, and (2) directly conflicts with provisions of predecessor of AAIA); *San Diego Unified Port District v. Superior Court*, 136 Cal. Rptr. 551 (Cal. Ct. App. 4th Dist. 1977), *cert. denied sub nom. Britt v. San Diego Unified Port District*, 434 U.S. 859 (1977) (curfew imposed by proprietor held preempted by Federal law).

did not conflict with Federal law.[36] Because the trial court's dismissal of this case on a Fed. R. Civ. P. 12(b)(6) motion was affirmed, the Town was improperly spared from making such a showing.

E. Review is Warranted; However, Remand May Be Appropriate.

Although review of this case is warranted so that these important Federal issues may be settled, the RAA recognizes that the Second Circuit may simply have not appreciated the significance of Section 308(a) of the Federal Aviation Act, 49 U.S.C. § 1349(a), and Section 511 (a) of the AAIA, 49 U.S.C. App. § 2210(a), or of its holding that proprietary powers and rights recognized under Section 105(b)(1) of the Federal Aviation Act are not limited by Section 105(a)(1) of that Act, 49 U.S.C. §§ 1305(a)(1) and (b)(1). The RAA submits that it may be more appropriate for this Court to vacate the Second Circuit's decision and remand the case with instructions to reconsider in light of the above. Upon reconsideration, the Second Circuit may well obviate the need for review by this Court.

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[36] *Arrow Air, Inc. v. Port Authority of New York*, 602 F. Supp. 314 (S.D.N.Y. 1985) (Arrow obtained a waiver from FAA noise regulations, but not from similar local regulations, held, local regulations not preempted, discriminatory, unreasonable or an undue burden on commerce); *Global International Airways Corp. v. Port Authority of New York*, 727 F.2d 246 (2d Cir.), *reh'g denied*, 731 F.2d 127 (2d Cir. 1984) (proprietor imposed requirement of accelerated compliance with 14 C.F.R. Pt. 36 not facially preempted, case remanded for factual determination of whether, on airline-by-airline basis, local regulation, in itself or in combination with other regulations, actually caused each airline to accelerate compliance with Part 36 or caused undue hardship; if so, injunction to be granted against enforcement of the regulation); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981) (proprietor imposed noise regulation held reasonable and not preempted); *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976) (curfew imposed by proprietor on aircraft in excess of 75 dBA not preempted nor undue burden on interstate commerce, nor in violation of Federal grants).

III. The Provisions of Section 511(a) of the AAIA Are Enforceable Under 42 U.S.C. § 1983 or in a Private Action by an Air Carrier.

The RAA concurs with the analysis provided in petitioner's brief demonstrating that MCA may sustain a claim under 42 U.S.C. § 1983 for the Town's violations of Section 511(a) of the AAIA, 49 U.S.C. App. § 2210 (a), and that a private action may be brought under Section 511(a) itself. Additionally, the RAA would invite the Court's particular attention to *New York Airlines, Inc. v. Dukes County*, 623 F. Supp. at 1443-48, in which Judge Wolf presents a particularly cogent discussion establishing that violations of Section 511(a) are cognizable under 42 U.S.C. § 1983.[37] The RAA would also add several points to petitioner's discussion of these matters.

First, additional evidence that air carriers are intended and primary beneficiaries of Section 511(a)'s nondiscrimination provisions is seen in Section 511(a)(1)(A), 49 U.S.C. App. § 2210(a)(1)(A), which provides that tenant status will not be unreasonably withheld by an airport from an air carrier, and in Section 511(a)(1)(C), *id.* at § 2210(a)(1)(C), which provides that each air carrier shall have the right to service itself or use an FBO at the airport. Air carriers are the only possible direct and primary beneficiaries of those protections.[38]

Second, the crux of the Second Circuit's decision that 42 U.S.C. § 1983 may not be used with respect to Section 511(a) of the AAIA is that the "comprehensive enforcement" scheme of the Federal Aviation Act manifests a congressional intent to foreclose an action under Section 1983.[39] The Second Circuit evidently misunderstood the Federal aviation laws because precisely the opposite is

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[37] *But see The Interface Group, Inc. v. Massachusetts Port Authority*, 631 F. Supp. 483 (D. Mass. 1986).

[38] MCA alleged violations of Section 511(a) in its Complaint, but sought no relief thereunder. Nonetheless, the Eastern District entered findings dismissing that claim, thereby preserving the issue for review by this Court. Petitioner's brief at 29a (Appendix C).

[39] Petitioner's brief at 43a (Appendix D); 784 F.2d at 96-97.

the case. Section 511(a) is part of the AAIA, not the Federal Aviation Act; thus, the criminal and civil penalties of the Federal Aviation Act are not available to enforce violations of Section 511(a) of the AAIA.

By contrast, Congress expressly provided that the extensive investigation powers available under the Federal Aviation Act would be available under the AAIA. Section 313(c) of the Federal Aviation Act, 49 U.S.C. § 1354(c); *see* 14 C.F.R. §§ 13.1 and 13.3 (with reference to the predecessor of the AAIA). The fact that Congress linked the two statutes for purposes of investigation, but not for purposes of enforcement, evinces that Congress consciously chose not to make the Federal Aviation Act's enforcement provisions available under the AAIA. Accordingly, as the Second Circuit's decision that relief is not available under 42 U.S.C. § 1983 is predicated upon the availability of the enforcement scheme of the Federal Aviation Act for AAIA violations, it errs.[40]

The RAA submits that violations of Section 511(a) should be cognizable under 42 U.S.C. § 1983, or in a private action. Absent such procedural avenues, air carriers will be unable to enforce the protections under Section 511(a) of which they are the direct and primary beneficiaries. *See United States v. Westchester County*, 571 F. Supp. at 798 (explaining irreparable injury flowing from airport curfew). As discussed *supra* n.40, the FAA's enforcement powers under the AAIA are limited and largely proscriptive. Moreover, the FAA cannot police the administration of these laws alone. It is unable to dedicate significant resources to these problems and consequently only takes an interest in the most significant cases, usually involving major airports or large carriers. This particularly affects the regional/commuter

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[40] Federal enforcement of the AAIA is limited to funding termination, breach of grant assurance action, or orders issued pursuant to Section 519 of the AAIA, 49 U.S.C. App. § 2218. *See City of Pompano Beach*, 774 F.2d at 1536, 1537-38; *United States v. Westchester County*, 571 F. Supp. at 798; *see also* 14 C.F.R. Pt. 152, Subpt. F (with reference to the predecessor of the AAIA).

carriers, which generally serve smaller airports in which the FAA has comparatively little interest in access matters.[41] Additionally, the FAA's expertise is not required to remedy violations of Section 511(a).

Should the FAA become the only forum for Section 511(a) violations, because judicial relief is unavailable to air carriers, the Agency will be overwhelmed by these matters, which can only detract from its primary mission of air safety. Moreover, administrative relief often takes years to obtain, as illustrated by *City of Pompano Beach* (complaint filed with FAA July 1981, FAA preliminary order issued March 1983, FAA final order issued February 1985, affirmed by Eleventh Circuit November 1985); thus, relief will come too late to prevent carriers from sustaining major losses while awaiting relief. In fact, significant monetary losses can and have occurred in such cases, and cannot be recouped. *See United States v. Westchester County*, 571 F. Supp. at 798. Without the availability of an action under 42 U.S.C. § 1983 or a private action under Section 511(a) itself, interim relief is virtually unobtainable, and whether the airport's violation is successfully challenged will largely depend on whether the air carrier can survive financially the burdens of the airport's unlawful conduct during the FAA's investigation and subsequent litigation. Congress certainly did not intend such an outcome in the enactment of the AAIA, and the case for finding a private action is compelling when, as here, the practical limitations on agency enforcement and the inadequacy of remedies will result in a frustration of Congressional purpose.[42]

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted and the case reviewed by this Court. Alternatively, the case should be vacated and remanded to the Second Circuit for reconsideration.

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[41] *See* PS-83, *supra* n.26, at 9949 (noting particular adverse effects of state regulation on commuter carriers and their comparative inability to challenge unlawful state conduct).

[42] *See J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

Respectfully submitted,

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